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## Cover Page Footnote

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# RESOLUTION OF MASS PRODUCT LIABILITY LITIGATION WITHIN THE FEDERAL RULES: A CASE FOR THE INCREASED USE OF RULE 23(b)(3) CLASS ACTIONS

*Heather M. Johnson**

## INTRODUCTION

Mass product liability litigation is overwhelming the civil justice system.[1] Much of this litigation involves literally thousands of individuals who have suffered injuries as a result of their exposure to pharmaceutical products, medical devices, or toxic substances.[2] Mass product liability litigation differs from ordinary litigation because it involves a greater number of claimants, common issues and actors, and because the value of each claim is interdependent.[3] Recent mass product lia-

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1. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 Brook. L. Rev. 961, 961 (1993); *see also* Deborah R. Hensler et al., Trends in Tort Litigation: The Story Behind the Statistics 6-8 [hereinafter Trends in Tort Litigation] (illustrating that the number of products liability suits filed in federal court has soared). In 1981, there were approximately 7500 cases pending against A.H. Robins, manufacturer of the Dalkon Shield. *Id.* at 10. By 1986, more than 325,000 claims had been filed in bankruptcy court. *Id.*

2. Hensler & Peterson, *supra* note 1, at 961. Although many types of claims may fall under the general category of mass tort litigation, this Note specifically addresses mass product liability claims, at times referred to as "mass exposure claims," which involve claims against corporations for losses incurred as a result of an individual's use of a product manufactured by that corporation. Moreover, this Note specifically addresses claims that involve personal injury. Mass personal injury torts should be distinguished from mass property damage torts. Mass torts involving property damage often involve greater homogeneity among class members, greater commonality of factual issues, and are more likely to be certified as class actions. *See, e.g.*, Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628, 642-43 (D.S.C. 1992) (certifying a class of approximately 500 property owners with friable asbestos in their buildings regarding eight common issues), *aff'd*, 6 F.3d 177 (4th Cir. 1993); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1344 n.2 (1995).

3. Hensler & Peterson, *supra* note 1, at 966-67.

bility claims include suits against the manufacturers of antihemophilic factor ("AHF"),[4] silicone breast implants,[5] bendectin,[6] and asbestos.[7]

The current prevalence of mass product liability litigation results from several phenomena. Mass marketing of products increased the general population's exposure to potentially injurious products at the same time the mass media became more attuned to consumer and environmental safety issues. The medical community also developed a greater capability to prove the nexus between an injury and exposure to a particular product. In addition, legal rules and procedures developed that facilitated suits by plaintiffs seeking compensation from product manufacturers.[8]

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4. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). For a full discussion of the *Rhone-Poulenc* litigation, see part II.

5. *See In re* Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1447 (N.D. Ala. 1995). In 1963, Dow Corning placed silicone breast implants on the market that have allegedly developed leaks into women's bodies causing immune diseases, neurological disorders, lupus, and connective tissue disorders. Hensler & Peterson, *supra* note 1, at 992, 995. The FDA did not evaluate or approve of silicone implants because it did not have the authority to regulate medical devices. William Booth, *Women Assail, Praise Silicone At Hearing*, Wash. Post, Nov. 13, 1991, at A1, A4. Although Congress passed legislation that eventually required the FDA to evaluate the safety of the implants, the FDA permitted implants to stay on the market while it determined their safety. *Id.*

6. *See In re* Richardson-Merrell, Inc., "Bendectin" Prods. Liab. Litig., 624 F. Supp. 1212 (S.D. Ohio 1985), *aff'd sub nom.* 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). In 1956, the FDA approved Bendectin for treatment of morning sickness during pregnancy. Hensler & Peterson, *supra* note 1, at 978. Litigation against the manufacturer of Bendectin began in 1977, asserting that ingestion of the drug during pregnancy caused birth defects. *See* Mekdeci v. Merrell Nat'l Labs., 711 F.2d 1510, 1512 (11th Cir. 1983).

Although the FDA reevaluated the safety of the drug in 1979, it found that no conclusive evidence existed that the drug caused birth defects. As a result, Merrell Dow did not cease manufacturing the drug until it voluntarily did so nearly four years later. Hensler & Peterson, *supra* note 1, at 978.

7. *See In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991). Asbestos was used for many years as an insulation material. Evidence subsequently showed, however, that inhalation of asbestos could cause asbestosis, lung cancer, and mesothelioma. Hensler & Peterson, *supra* note 1, at 1003 (footnote omitted). For various discussions regarding other mass tort litigation, see *In re* Northern Dist. Of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 848-50 (9th Cir. 1982) (discussing various aspects of the suits regarding the claim asserted against the manufacturers of the IUD which was linked to Pelvic Inflammatory Disease and fatal septic abortions), *cert. denied*, 459 U.S. 1171 (1983); Sindell v. Abbott Labs., 607 P.2d 924, 924, 938 (Cal.) (holding that plaintiff could recover from manufacturer of diethylstilbestrol ("DES"), whose drug was linked to many types of cancer although plaintiff could not prove which manufacturer had produced the drug), *cert. denied*, 449 U.S. 912 (1980); Paul D. Rheingold, *The MER/29 Story-An Instance of Successful Mass Disaster Litigation*, 56 Cal. L. Rev. 116, 116 (1968) (discussing the first mass tort litigation in which a plaintiffs' attorneys litigation group coordinated efforts against defendant, Richardson-Merrell, Inc., in a product liability suit involving a cholesterol-lowering drug that was linked to irreversible cataracts and skin and hair problems).

8. Hensler & Peterson, *supra* note 1, at 1013.

The civil justice system has fared poorly in resolving mass product liability claims effectively.[9] Inordinate delays plague the system; cases remain unresolved for decades.[10] For example, the actions instituted against the manufacturers of diethylstilbestrol ("DES") have been lingering in the civil justice system for over thirteen years.[11] In 1983, the United States District Court for the District of New Hampshire in *Mertens v. Abbott Laboratories* declined to certify a potential class consisting of women who were exposed to DES in utero who alleged that this exposure caused cancer and other serious conditions.[12] In 1995, women are still litigating claims based on their exposure to DES in *Kurczi v. Eli Lilly & Co.*[13]

Similar delays have plagued the asbestos litigation. In 1973, the Fifth Circuit held in *Borel v. Fibreboard Paper Products Corp.*[14] that asbestos manufacturers could be held strictly liable for injuries caused from exposure to products containing asbestos.[15] Presently, as many as 100,000 asbestos claims remain pending.[16] Thus, asbestos cases continue to burden courts' dockets, with little hope of resolution in the near future.[17]

Litigation involving tetracycline manufacturers also has lingered in the courts.[18] In *Adams v. Lederle Laboratories*,[19] a case filed in 1983, plaintiffs alleged that improper administration of tetracycline caused discoloration and structural deterioration of their teeth.[20] The case is still pending in the Western District of Missouri.[21]

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9. Deborah R. Hensler et al., Asbestos in the Courts: The Challenge of Mass Toxic Torts 24-29 (1985) [hereinafter Asbestos in the Courts].

10. Hensler & Peterson, *supra* note 1, at 963.

11. *See* Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 670 (N.D. Ohio 1995) (declining to certify a class composed of women exposed to DES); Mertens v. Abbott Laboratories, 99 F.R.D. 38, 43 (D.N.H. 1983) (declining to certify a class action consisting of women exposed to DES).

12. *Mertens*, 99 F.R.D. at 39 (stating that these adverse effects include "cancerous or pre-cancerous conditions, repeated pregnancy losses, infertility, incomplete, defective or abnormal development of their reproductive tracts and other[s]").

13. *Kurczi*, 160 F.R.D. at 667.

14. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

15. *Id.* at 1081. In *Borel*, the court considered an individual claim; it did not involve a class action complaint. *Id.*

16. Steven L. Schultz, In re *Joint Eastern & Southern District Asbestos Litigation: Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 Brook. L. Rev. 553, 561 (1992).

17. For a comprehensive discussion of asbestos litigation from 1973 to the present, see Coffee, *supra* note 2, at 1384-1404.

18. *See In re* Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985); Adams v. Lederle Labs., 569 F. Supp. 234 (W.D. Mo. 1983). The District Court for the Western District of Missouri refused to certify a class to resolve the claims against tetracycline manufacturers. *Tetracycline*, 107 F.R.D. at 736.

19. 569 F. Supp. 234 (W.D. Mo. 1983).

20. *Id.* at 237.

21. For an example of a development in the ongoing litigation, see *In re* Tetracycline Cases, 927 F.2d 411 (8th Cir. 1991), in which the court reviewed the District Court's decision to hold an attorney in contempt. *Id.* at 411-12.

The present state of mass product liability litigation disadvantages all parties litigating a claim. Long delays often mean that individual plaintiffs do not survive to see the outcomes of their cases.[22] The results achieved through mass product liability litigation often appear to be arbitrary; the compensation awarded often does not reflect the harm the plaintiff has suffered or the culpability of the defendant.[23] Costs of sustaining the litigation are unquestionably too high. Transaction costs often greatly exceed compensation awarded to victims.[24] As a result, some victims are denied access to the system and others may not receive timely compensation. This result may significantly reduce the deterrent effect of potential mass liability.[25] In addition, defendants may be susceptible to excessive punishment both from multiple punitive damage awards and the high costs of defending identical claims on a case-by-case basis.[26]

Congress has provided federal courts with Federal Rule of Civil Procedure 23 as a flexible device to facilitate the grouping of claims or issues to resolve litigation involving numerous plaintiffs with similar

22. Hensler & Peterson, *supra* note 1, at 963 (citing Asbestos in the Courts, *supra* note 9, at 25-27; Judicial Conference Ad Hoc Committee On Asbestos Litigation, Report of the Ad Hoc Committee (1991)).

23. Hensler & Peterson, *supra* note 1, at 963; *see also In re* School Asbestos Litig., 789 F.2d 996, 1001 n.3 (3d Cir.) (stating that inconsistent verdicts look "more like roulette than jurisprudence" (citation omitted)), *cert. denied*, 479 U.S. 852 (1986); *Federal Jury in New York Awards $31 Million in Consolidated Brooklyn Navy Yard Lawsuits*, [1990-1991] 5 Toxics L. Rep. (BNA) 1107 (quoting Jack B. Weinstein's description of asbestos case verdicts as "a lottery").

24. *See* Hensler & Peterson, *supra* note 1, at 963.

25. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 849, 900-05 (1984) [hereinafter *Public Law Vision*]. Some commentators have argued that in the mass tort context the participants perceive compensation to be the primary objective. Coffee, *supra* note 2, at 1355. John Coffee perceives deterrence as a problematic objective because most products that give rise to mass tort litigation are removed from the market long before the suit is ever brought. *Id.* Some critics argue that neither the goals of deterrence nor corrective justice are realizable in the mass tort context. *See* Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 Md. L. Rev. 951, 962 (1993) ("A system designed to achieve corrective justice goals in two-party accidental harm cases simply cannot be accommodated effectively to the demands of mass tort cases [involving] . . . long-latent toxic disorders."); Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. Leg. Stud. 779, 785 (1985) (stating that the deterrent value of penalties depends heavily on their proximity to the act for which the penalties are assessed).

26. David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L.J. 561, 564 (1987) ("Win or lose, the system's private law process exacts a punishing surcharge from defendant firms as well as plaintiffs.") [hereinafter *Individual Justice*]. Defendants' legal fees and expenses totaled between $4.7 and $5.7 billion dollars in nationwide tort litigation in 1985, out of a total $16 to $19 billion spent for the various costs of the tort litigation system. Trends in Tort Litigation, *supra* note 1, at 26-28. In the asbestos litigation, defendants' legal fees and expenses constituted 37% of the per-claim expenditures, plaintiffs' net compensation constituted 37%, and plaintiffs' legal fees and expenses constituted 26%. *Id.*

claims.[27] Under Rule 23, a court may choose to certify a class to resolve either an entire controversy or specific issues.[28] Rule 23 also grants courts the authority to certify several types of class actions if a claim or issue meets the Rule's requirements.[29] The few courts that have certified classes in mass product liability litigation have typically done so under Rule 23(b)(3).[30] Consequently, this Note focuses on this type of class action.[31]

The class action device grants courts numerous advantages in resolving mass product liability litigation. By permitting the adjudication of many claims at once, the class action device reduces the burden on the civil justice system to process individual claims. Rule 23 allows plaintiffs to combine resources and litigate claims or issues together, thereby providing access to the civil justice system for plaintiffs who lack financial resources to bring individual claims. Faced with a greater number of suits and potential liability, companies will have a more effective incentive to develop and market their products safely.[32] By resolving many claims or issues at once, the class action device has the potential to save plaintiffs and defendants the litigation costs that result from individual adjudication. Rule 23 also benefits defendants by binding class members if they win a class action suit.[33] Moreover, under Rule 23(c)(4)(A), courts have the flexibility to resolve common issues together, yet allow parties to litigate unique issues or legal questions independently.[34] Consequently, parties who may have stronger individual claims or defenses against their adversary may preserve their advantage.

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27. *See* Fed. R. Civ. P. 23.

28. *See* Fed. R. Civ. P. 23(c)(4)(A).

29. *See* Fed. R. Civ. P. 23(b). Rule 23(b)(1) mandates certification of classes if individual actions would prejudice the defendant or absent class members. Under Rule 23(b)(2), a court must certify a class when the defendant has acted or refused to act on grounds generally applicable to the class and injunctive relief is proper. A court may certify a Rule 23(b)(3) class action if it is superior to other methods available to adjudicate the controversy and if common questions predominate in the litigation over individual issues.

30. Jack B. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices 135 (1995). A federal court has the discretion to certify this type of class action under Rule 23(b)(3). Rule 23(b)(3) class actions are distinguishable from Rule 23(b)(1) and (b)(2) actions because only Rule 23(b)(3) class actions require notice to all class members of the existence of a class proceeding and permits class members to exclude themselves from the binding effect of the judgment (the "opt out" provision). *See* Fed. R. Civ. P. 23(b)(3), (c)(2).

31. *See infra* part II.A.

32. *See infra* part IV.D.

33. All class members may not be bound under Rule 23(b)(3) class action. *See infra* part II.F.

34. *See* Fed. R. Civ. P. 23.(c)(4)(A).

The courts, however, have been reluctant to certify class actions in the mass product liability context.[35] These courts often rely upon common preconceived notions regarding the drawbacks of class certification in mass product liability claims. These notions include problems of determining applicable law, protection of litigants' interest in individual justice, and fears of "blackmail settlements."[36] For example, a typical failure to invoke a Rule 23(b)(3) class action occurred in the recent mass exposure case *In re Rhone-Poulenc Rorer, Inc.*[37] In *Rhone-Poulenc*, the Seventh Circuit invoked many of these concerns in refusing to uphold the District Court's certification of a potential class of plaintiffs that had filed suit against manufacturers of AHF, a blood product which had infected potential class members with Human Immunodeficiency Virus ("HIV").[38]

This Note argues that courts should not hesitate to certify classes of plaintiffs, at least with respect to common issues, in mass product liability suits under Rule 23(b)(3) type class actions. Mass exposure cases involve a high degree of commonality of factual issues and legal questions.[39] In such cases, plaintiffs have suffered similar injuries resulting from exposure to identical products; they face similar causation and liability issues.[40] Thus, certification of class actions in mass product liability litigation would allow courts to resolve many mass exposure cases using the most efficient method provided by the current Federal Rules.[41]

Part I of this Note sets forth the requirements for class certification under Rule 23(b)(3). This part then provides the factual background and procedural history of *In re Rhone-Poulenc Rorer, Inc.*,[42] a typical product liability suit involving a claim against the manufacturers of AHF that was once certified as a Rule 23(b)(3) class action. Part II

35. *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297 (7th Cir.) (ordering decertification of the class in mass product liability context), *cert. denied*, 116 S. Ct. 184 (1995).

36. *See infra* part II.

37. 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

38. *Id.* at 1300-02. For other cases in which class certification was denied, see *In re* Northern District of Calif., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982) (regarding IUDs), *cert. denied*, 459 U.S. 1171 (1983); *In re* Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985) (regarding tetracycline); Caruso v. Celsius Insulation Resources, Inc., 101 F.R.D. 530 (M.D. Pa. 1984) (regarding urea formaldehyde insulation); Sanders v. Tailored Chemical Corp., 570 F. Supp. 1543 (E.D. Pa. 1983) (same); Mertens v. Abbott Laboratories, Inc., 99 F.R.D. 38 (D.N.H. 1983) (regarding DES); McElhaney v. Eli Lilly & Co., 93 F.R.D. 875 (D.S.D. 1982) (same); Ryan v. Eli Lilly & Co., 84 F.R.D. 230 (D.S.C. 1979) (same); Yandle v. PPG Indus., 65 F.R.D. 566 (E.D. Tex. 1974) (regarding asbestos); Rosenfeld v. A.H. Robins Co., 63 A.D.2d 11, 407 N.Y.S.2d 196 (App. Div. 1978) (regarding Dalkon Shield).

39. Hensler & Peterson, *supra* note 1, at 966.

40. *Id.* at 966-67.

41. For a discussion of why Rule 23 provides the most efficient method available to litigate mass product liability claims, see part IV.F.

42. 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

addresses the procedural complications presented by certification of Rule 23(b)(3) class actions in mass product liability litigation. Part III explains that objections to class certification in the mass product liability context do not present insurmountable obstacles to certification. Finally, part IV discusses the advantages of employing Rule 23(b)(3) in mass product liability litigation. This part then argues, in light of the various advantages of class certification, that class treatment of common issues was appropriate in *Rhone-Poulenc*. This Note concludes that federal courts should employ Rule 23(b)(3) class actions more freely in mass product liability litigation to fairly and efficiently resolve common claims or issues.

## I. RULE 23 AND THE LITIGATION OF A MASS PRODUCT LIABILITY CLAIM

Rule 23 grants courts the authority to aggregate claims by means of a "representative suit on behalf of groups of persons similarly situated."[43] Under Rule 23(c)(4)(A), a court may choose to certify a class with respect to an entire controversy or only particular issues.[44] To be certified as a class action, a potential class must meet all of the requirements of Rule 23(a), in addition to satisfying the criteria of one of the three types of class actions maintainable as described in Rule 23(b).[45] This part describes Rule 23 in general and discusses specifically the particular characteristics of a Rule 23(b)(3) class action. This part next examines *In re Rhone-Poulenc Rorer, Inc.*,[46] a case involving a typical mass product liability claim. In *Rhone-Poulenc*, the district court certified a Rule 23(b)(3) class action.[47] The Seventh Circuit ordered the District Court to reverse the class certification, however, following the course typically chosen by courts faced with class petitions involving mass product liability claims.[48]

### A. *Federal Rule of Civil Procedure 23*

Rule 23(a) contains four requirements.[49] The first requirement is that the class must be "so numerous that joinder of all members is

43. Herbert Newberg & Alba Conte, Newberg on Class Actions, § 1.01, at 1-2 (3d ed. 1992).

44. Fed. R. Civ. P. 23(c)(4)(A). This subsection provides that "When appropriate . . . an action may be brought or maintained as a class action with respect to particular issues." *Id.*

45. Newberg & Conte, *supra* note 43, § 3.01, at 3-5.

46. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1296 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

47. *Wadleigh*, 157 F.R.D. at 423.

48. *Rhone-Poulenc*, 51 F.3d at 1304.

49. Fed. R. Civ. P. 23(a). Rule 23 provides for a class action if the following requirements are met:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is

impracticable."[50] The rationale underlying this first requirement is that if joinder is possible, the class action device is not necessary to achieve a unified resolution of the litigation.[51] Second, Rule 23(a)(2) requires that the case must present "questions of law or fact common to the class."[52] This requirement ensures that the class action device serves to advance convenient and uniform resolution of common issues at once.[53] Rules 23(a)(3) and 23(a)(4) mandate that the class representative's claims or defenses be typical of the class and that the representatives fairly and adequately protect the interests of the class.[54] Rule 23(a)(3)'s requirement seeks to ensure that the interests of class representatives and members are sufficiently aligned so that the court can rely on the self-interest of the class representatives to drive them to pursue the interests of all class members.[55] Rule 23(a)(4) is intended to ensure that the named plaintiffs do not have any conflicts of interest with class members that would temper their prosecution of other class members' interests.[56]

In addition to complying with Rule 23(a), a potential class must further satisfy the requirements of one of three subdivisions of Rule 23(b).[57] Class actions are appropriate under Rules 23(b)(1) and

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so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

*Id.*

50. Fed. R. Civ. P. 23(a)(1).
51. Newberg & Conte, *supra* note 43, § 3.01, at 3-4.
52. Fed. R. Civ. P. 23(a)(2).
53. Newberg & Conte, *supra* note 43, § 3.01, at 3-4.
54. Fed. R. Civ. P. (a)(3), (4).
55. Newberg & Conte, *supra* note 43, § 3.01, at 3-4.
56. *Id.*
57. Fed. R. Civ. P. 23(b). Federal Rule of Civil Procedure 23(b) provides:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The

23(b)(2) if claims demand a single adjudication that binds all class members. Rule 23(b)(1) mandates certification of classes if individual actions would prejudice the defendant or absent class members.[58] Under Rule 23(b)(2), a court must certify a class when the defendant has acted or refused to act on grounds generally applicable to the class and injunctive relief is proper.[59]

A court may certify a Rule 23(b)(3) class action if it is superior to other methods available to adjudicate the controversy and if common questions predominate over individual issues in the litigation.[60] The decision of whether to certify a class action under Rule 23(b)(3) rests within the court's discretion. Rule 23(b)(3) class actions are distinguishable from Rule 23(b)(1) and (b)(2) actions because only Rule 23(b)(3) class actions require notice to all class members of the existence of a class proceeding and permit class members to exclude themselves from the binding effect of the judgment (the "opt out" provision).[61]

As mentioned, to qualify as a Rule 23(b)(3) class action, common questions of law or fact must predominate over individual questions in the litigation.[62] Courts have generally held that the predominance requirement is met if common issues constitute a significant part of the individuals' claims.[63] The second prong of Rule 23(b)(3) requires that class action resolution be superior to other methods of adjudication available. The Rule sets forth four factors that courts should consider to determine whether the superiority requirement is met:

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> matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

*Id.*

58. Fed. R. Civ. P. 23(b)(1).

59. Fed. R. Civ. P. 23(b)(2).

60. Fed. R. Civ. P. 23(b)(3).

61. Newberg & Conte, *supra* note 43, § 4.01, at 4-6. In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Supreme Court held that all class members must be notified if they "can be identified through reasonable effort." *Id.* at 176.

62. *See* Fed. R. Civ. P. 23(b)(3).

63. *See* Watson v. Shell Oil Co., 979 F.2d 1014, 1022 (5th Cir. 1992) ("In the context of mass tort litigation, we have held that a class issue predominates if it constitutes a significant part of the individual cases."); Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5th Cir. 1986) (noting that "[i]n order to 'predominate,' common issues must constitute a significant part of the individual cases"); *In re* School Asbestos Litig., 104 F.R.D. 422, 431-32 (E.D. Pa. 1984) (noting that when "common questions . . . [are] a significant aspect of the case" certification is allowed), *aff'd in part, rev'd in part*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *see also In re* Tetracycline Cases, 107 F.R.D. 719, 727 (W.D. Mo. 1985) (stating that "the issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole").

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[64]

The Advisory Committee Notes indicate that this list is not exhaustive and that courts may consider other factors relevant to the litigation to make their determination.[65] Consequently, ascertaining whether a class action is the superior vehicle to process mass product liability claims is often difficult because of the multiplicity of factors involved in reaching such a decision.[66] In addition, courts have specifically struggled with one factor relevant to determining whether a potential class meets the superiority requirement; whether a class action would be manageable "has been the most hotly contested and the most frequent ground for holding a class action is not superior."[67] Accordingly, courts exercise a great deal of discretion in determining whether a potential class meets the superiority requirement.

*Rhone-Poulenc* is one case in which the court wrestled with the issue of whether a Rule 23(b)(3) class action was appropriate to resolve the mass product liability claim before it. The complaint in *Rhone-Poulenc* was filed in September 1993 against four manufacturers of AHF on behalf of hemophiliacs (or their next of kin in cases in which the hemophiliac had died) who were infected with HIV as a result of their use of AHF.[68] The next section traces the development of Acquired Immunodeficiency Syndrome ("AIDS") and HIV in the hemophiliac community that gave rise to the class action petition sought in *Rhone-Poulenc*. It then explores the procedural history of *Rhone-Poulenc*, including a detailed examination of the District Court's certification order and the Circuit Court's issuance of a writ of mandamus directing the District Court to reverse the class certification.

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64. Fed. R. Civ. P. 23(b)(3).

65. *Rules Advisory Committee Notes to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 104 (1966).

66. For example, one of these factors is found in the Uniform Class Actions Act which compels a court to consider whether a class action is the most efficient or practical method to resolve claims or issues. Uniform Class Actions Act § 3(a) (National Conference of Commissioners on Uniform State Laws, final draft adopted Aug. 5, 1976), *in* Newberg & Conte, *supra* note 43, § 4.27, at 4-109. Courts also have considered the interests of members in individually controlling their suits, especially in suits that involve personal injuries because they seem to require individual trial tactics to attain appropriate damage awards. *See In re* Northern District of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

67. Newberg & Conte, *supra* note 43, § 4.32, at 4-125.

68. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 414 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

### B. *Creation of the Basis of a Mass Product Liability Claim*

Hemophilia is a hereditary bleeding disorder that affects approximately 20,000 persons in the United States.[69] This disease results from a deficiency of proteins in the blood, commonly known as Factor VIII and Factor IX, that are necessary for coagulation.[70] The disease causes excessive bleeding, which may be the result of trauma or may be spontaneous.[71]

Before the late 1970s and early 1980s, common treatment for hemophiliacs included transfusions of plasma or whole blood.[72] These treatments required hospitalization and were not extremely effective, because the plasma and whole blood did not contain high levels of Factor VIII and IX.[73] In the late 1960s, however, scientists developed a process that enabled them to extract Factor VIII and Factor IX from donors' blood, concentrate it, and infuse the hemophiliac with the concentrate, known as AHF.[74] AHF was more effective than whole blood transfusions in preventing and stopping episodes of bleeding and did not require hospitalization because the patient could receive infusions at home.[75] The new product, however, "was concentrated from blood factors drawn from hundreds or thousands of people, multiplying the risk of getting tainted blood."[76]

In 1981, scientists identified AIDS in the general population. The diagnosis in hemophiliacs did not take place until 1982.[77] By 1984, the medical community agreed that HIV transmission occurred via semen and blood.[78] That same year, the medical community discovered that the virus could be killed by heating the blood supply.[79] Then, in 1985, scientists discovered a reliable test for the presence of HIV.[80] All blood donated for the manufacture of AHF has undergone testing for the presence of HIV since 1985.[81] Supplies that test negative are still heat-treated because the tests for HIV are not infallible.[82]

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69. *Id.* at 413. For a discussion of hemophilia generally, see Leon W. Hoyer, *Hemophilia A*, 330 New Eng. J. Med. 38 (1994).

70. *Wadleigh*, 157 F.R.D. at 413.

71. *Id.*

72. *Id.*

73. *Id.* at 413-14.

74. Donna Shaw, *On the Trail of Tainted Blood*, The Phila. Inquirer, Apr. 16, 1995, at E2.

75. *Id.*

76. Michael Unger, *Tainted Blood; Hemophiliacs Sue Drug Companies Over HIV Infection*, Newsday, Oct. 2, 1993, at 7.

77. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

78. *Id.*

79. *Id.*

80. *See id.*

81. *Id.*; Unger, *supra* note 76, at 7.

82. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

HIV and AIDS have had a widespread and devastating effect upon the hemophiliac population.[83] More than half of all hemophiliacs were infected with HIV by 1985.[84] More than eighty percent of hemophiliacs with severe hemophilia contracted HIV by that same year.[85] Attorneys representing the HIV-infected hemophiliacs in *Rhone-Poulenc* have presented evidence that 2000 hemophiliacs have died of AIDS and nearly half or more of the remaining hemophiliac population may be HIV-positive.[86]

AIDS has decreased the life span of people with hemophilia by thirty percent.[87] As a result, the life expectancy for hemophiliacs has fallen to the same level that existed before modern treatment was available.[88] The median age of death for hemophiliacs fell dramatically—from fifty-seven years in 1979-81 to forty years in 1987-90.[89] An author of a new study of hemophilia stated: "Sadly, we've taken a giant step backwards."[90] Death rates for persons with hemophilia have tripled.[91] In 1979, 400,000 individuals in the United States suffering from hemophilia died.[92] In 1989, the death rate for hemophiliacs in the United States was 1.3 million.[93]

Spokespeople for the pharmaceutical companies claim that the companies "did everything possible to provide a safe product."[94] As more information became available regarding the development of HIV in AHF, however, questions began to arise regarding whether AHF, which initially was hailed as a miracle for hemophiliacs, should not have ever been put on the market because of its potential dangers.[95] Investigations into what the defendants actually knew about the dangers of AHF and what measures they could have taken to

83. David Gates et al., *An American Tragedy in Iowa*, Newsweek, Feb. 7, 1994, at 44 ("Since Vince and Mary Goedken celebrated their golden wedding anniversary in 1986, seven family members have died of AIDS; an eighth is HIV-positive. They are victims of America's 'hemophilia holocaust': the spread of AIDS among hemophiliacs who received contaminated blood products.").

84. *U.S. CDC: HIV Cutting Lives Short in Hemophilia, Study Says*, AIDS Wkly., Feb. 14, 1994 [hereinafter *Study*].

85. *Id.*

86. *Rhone-Poulenc*, 51 F.3d at 129; Bryan D. Garruto & Frances A. Tomes, *In the Dark Shadow of AIDS: How Safe Is The Blood Supply*, N.J. Law., Apr. 26, 1993, at 19 ("In January 1990, the CDC estimated that 10,000 hemophiliacs . . . had been infected with AIDS and HIV.").

87. *Study*, *supra* note 84.

88. *Id.*

89. *Id.*

90. *Id.* (quoting author Dr. Terence Chorba).

91. *Study*, *supra* note 84.

92. *Id.*

93. *Id.*

94. *See, e.g.*, Unger, *supra* note 76, at 7 (" 'The company and the industry did everything possible to provide a safe product,' said Edward Colton, vice president and general counsel for Alpha Therapeutic, one of the companies.")

95. *See* Elizabeth Kastor, *Blood Feud: Hemophiliacs & AIDS*, Wash. Post, May 10, 1993, at B1. At first, Dick Valdez's only thought was of saving his sons when he

make their product safer revealed disturbing implications. According to one HIV-infected hemophiliac, "the companies who sold tainted blood products are guilty of 'mass murder.' "[96]

The first link between blood, plasma infusions, and blood-borne viruses was discovered during World War II.[97] In 1945, Captain Emanuel M. Rappaport of the United States Army Medical Corps published an article in the Journal of the American Medical Association concluding that transfusions could transmit hepatitis and that " 'pooling of plasma probably increases considerably the incidence of jaundice among the recipients.' "[98] One year later, Rappaport proposed the screening of donors and urged research into ways to kill blood-borne viruses.[99] In 1950, University of Chicago researchers published a study demonstrating how heat could kill blood-borne viruses in whole blood.[100]

Throughout the 1960s and most of the 1970s, heat-treatment techniques to inactivate viruses in blood remained unperfected. During this course of time, non-heat-treated AHF received approval from the Food and Drug Administration. Because manufacturers of AHF did not possess the technology to deactivate viruses in their product, Stanford University Professor Judith Pool and the World Federation of Hemophilia repeatedly urged the government to prevent the use of paid donors in the manufacture of AHF because they created an increased presence of hepatitis and other blood-borne viruses in the product.[101] In 1977, the World Health Organization also suggested to manufacturers that they should kill viruses in their products. By 1978, a German drugmaker actually killed viruses in AHF by heating the product.[102]

The manufacturers of AHF chose not to employ the German heat-treatment technique, mainly because the process reduced the yield of clotting factor. Given the product's great benefits, the government, manufacturers, and some doctors merely accepted the almost certain risk that most hemophiliacs would contract the potentially deadly hep-

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treated his hemophiliac sons with Factor VIII. *Id.* Now his sons are in their twenties and they are HIV-positive. *Id.*

96. Barbara Yost, *Lethal Medicine; Hemophiliacs Dying of AIDS Were Infected by Contaminated Drugs. Is the Blood Industry Guilty of this 'Mass Murder'?*, Phoenix Gazette, Oct. 17, 1993, at G1 ("Somebody sold us out for a dollar.").

97. Shaw, *supra* note 74, at E1.

98. *Id.* Considering AHF was produced by pooling tens of thousands of donors, the risk of individuals using the product contracting the virus was near certain. *Id.* at E2. While "[l]arge pools are highly profitable . . . they are medically bankrupt." *Id.*

99. *Id.* at E1.

100. *Id.* The technique unfortunately also killed the clotting proteins in the blood. *Id.*

101. Pool and colleagues developed cryoprecipitate, a plasma paste made from several donors, that "revolutionized hemophilia treatment." Shaw, *supra* note 74, at E1.

102. *Id.*

atitis disease.[103] As a result, in 1982, when the first hemophiliac was diagnosed with AIDS, no heat-treated AHF was available in the United States although a safer product was available in Germany.[104]

Only in 1983, after a majority of the hemophiliac population was infected with HIV and after certain manufacturers began to forecast a loss of business if the competitors provided a heat-treated product faster,[105] did the companies in the United States begin to develop a safer product. A recent report by the National Institute of Medicine concluded that: "In the Committee's judgment, heat-treatment processes to prevent the transmission of hepatitis could have been developed before 1980, an advance that would have prevented many cases of AIDS in individuals with hemophilia."[106] As a result, the tragic injuries suffered by the hemophiliac population laid the foundation for a new mass product liability claim.

### C. *Judicial Management of a Mass Product Liability Claim*

Nearly 400 plaintiffs have filed almost 300 lawsuits against the manufacturers of AHF in state and federal courts.[107] The panel on multidistrict litigation consolidated all of the federal cases for pretrial discovery in the Northern District of Illinois.[108]

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103. *Id.* at E2.

104. *Id.*

105. *See id.* Alpha Therapeutics waited until their marketing department, whose job was to keep up with competitors, gave their research and development a directive to begin research on heat-treatment. *Id.*

106. Institute of Medicine, *HIV and the Blood Supply: An Analysis of Crisis Decisionmaking*, Nat'l Academy Press, Wash., D.C. 1995, at 4-13.

107. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995); Shaw, *supra* note 74, at E2-E3. Sixty percent of the suits were filed in state courts and the remaining forty percent in federal courts. *Rhone-Poulenc*, 51 F.3d at 1296.

108. Under 28 U.S.C. § 1407, when civil actions involving one or more common and often complex questions of fact are pending in several federal district courts, the actions may be transferred to one district for coordinated and pretrial proceedings under a single judge. 28 U.S.C. § 1407 (1994). The statute provides in pertinent part:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings . . . [if] such proceeding will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated. . . .
>
> (b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation.

*Id.* Although consolidation of pretrial proceedings permits efficient judicial resolution of discovery and other preliminary matters, individual claims are remanded for trial to their original district. Plaintiffs are denied the opportunity to try their cases together with other similarly situated plaintiffs. Thus, they are forced to pay the ex-

*Rhone-Poulenc* was one of the 300 suits spawned by the AHF controversy involving a class action complaint filed in September 1993.[109] The complaint alleged that class members' infections resulted from the negligence of the defendant manufacturers.[110] The complaint also included a count that charged the National Hemophilia Foundation with negligence and a breach of fiduciary duty.[111]

The plaintiffs offered two theories of liability. The first theory contended that before the pharmaceutical companies became aware of the presence of AIDS or HIV in the blood supply, they were aware of the presence of hepatitis, another lethal disease in the blood product.[112] Thus, the defendants did not proceed with due care because they failed to take steps to eliminate the presence of hepatitis in their product.[113] Had the defendants taken effective measures to kill hepatitis, the defendants would have unknowingly also killed HIV.[114] The plaintiffs argued that the defendants could have heat-treated the blood, screened blood donors, or refused to deal with certain donors known to be at high risk of infection with hepatitis.[115]

The plaintiffs' second theory of liability asserted that the defendants "dragged their heels in screening donors and taking other measures to prevent contamination of [AHF]" once they became aware of the presence of HIV in the early 1980s.[116] Heat-treating techniques to kill hepatitis were available by the 1940s; the defendants, however, did not perfect and utilize the techniques to inactivate viruses in AHF until 1983.[117]

Judge Grady of the United States District Court for the Northern District of Illinois partially certified the plaintiff class in *Rhone-Poulenc* under the authority of Rule 23(c)(4)(A),[118] with respect to

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penses of prosecuting their claim during trial instead of being able to share these costs with other plaintiffs.

109. *Rhone Poulenc*, 51 F.3d at 1296. The four pharmaceutical companies named as defendants are Armour Pharmaceutical Company, Inc., Miles, Inc., Baxter Healthcare Corporation, and Alpha Therapeutic Corporation.

110. *Id.*

111. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 414 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

112. *Rhone-Poulenc*, 51 F.3d at 1296.

113. *Id.*

114. *Id.* at 1301.

115. *Id.* at 1296. The plaintiffs alleged that the defendants collected plasma from paid donors, a group they should have known included many persons, such as intravenous drug users, at high risk for viral infection. *Id.*

116. *Id.*

117. *See* Shaw, *supra* note 74, at E1 (stating that the "key issue . . . is why heat-treating techniques that killed hepatitis—techniques first used by Army-financed scientists back in the 1940s—were not perfected until 1983 for blood-clotting products used by hemophiliacs").

118. Fed. R. Civ. P. 23(c)(4). This section provides in pertinent part:

> (4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided

two issues: (1) the manufacturers' negligence, and (2) the National Hemophilia Foundation's breach of fiduciary duty.[119] Judge Grady reasoned that certification of a class action to determine these two issues was both feasible and useful because it offered the advantage of avoiding repetitive litigation.[120] He held that "fact questions as to what was known in the relevant scientific community at various times, and the efficacy of what the [manufacturers] were doing at various times, are common [to members of the class]."[121] Once a jury determined what the manufacturers knew at relevant times, it could determine the defendants' duty and whether each of the defendant companies breached that duty.

Judge Grady also recognized that "it is unlikely in the extreme that every member of the proposed class in this case would be able to fund a separate action of that kind, even with attorneys working on a contingent fee basis. Expert witness fees alone would run into the tens of thousands of dollars."[122] In addition, he noted that although varying state substantive laws would apply, "the definition of ordinary negligence is substantially identical in all jurisdictions."[123] Accordingly, a jury could determine whether the defendants breached their duty of reasonable care based on one generalized negligence standard.[124]

Judge Grady refused to certify a class to resolve the entire controversy because each plaintiff carried the burden of establishing which company's negligence was a proximate cause of his HIV infection.[125] Because the proximate cause issue would be unmanageable on a class-wide basis, Judge Grady found that certification of the entire controversy did not meet the requirements of Rule 23(b)(3).[126]

The defendants subsequently petitioned for a writ of mandamus to the Court of Appeals for the Seventh Circuit to reverse the class certi-

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into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

*Id.*

119. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 423 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). The class consisted of plaintiffs that were involved in the multidistrict litigation that was currently before the United States District Court for the Northern District of Illinois.

120. *Id.* at 415-16.

121. *Id.* at 421.

122. *Id.* at 415.

123. *Id.* at 419.

124. *See* Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 419 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

125. *Id.* at 422-23.

126. *Id.*

fication order.[127] A majority of the panel granted the writ and subsequently ordered decertification of the class.[128]

Judge Posner, writing for the majority in a 2-1 decision, reasoned that several concerns precluded certification of the class. He stated that class certification would subject defendants to intolerable settlement pressure.[129] He reasoned that class certification may facilitate prosecution of more claims than would otherwise be brought and pressure defendants to settle notwithstanding the possibility that the plaintiffs' claims lacked legal merit. As an indication of the possibility that the plaintiffs' claim was meritless, he considered their record of losing twelve of thirteen cases previously tried.[130] Judge Posner also expressed concern about the unfairness of forcing the defendants "to stake their companies on the outcome of a single jury trial."[131] He was concerned with one jury "hold[ing] the fate of an industry in the palm of its hand"[132] because that jury might disagree with the previous thirteen juries and "hurl the industry into bankruptcy."[133]

Judge Posner also found that the potential class would become unmanageable because the district court could not apply a single substantive law but would have to instruct the jury in accordance with conflicting state negligence laws.[134] He reasoned that if the district court applied one general negligence standard,[135] it would be creating a federal common law, a development prohibited by the Supreme Court in *Erie R.R. Co. v. Tompkins*.[136]

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127. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

A writ of mandamus is an instrument by which a superior court may compel a lower court to take a certain action. Writs of mandamus have traditionally been issued in response to abuses of judicial power. The remedy of mandamus is a drastic one, and thus, usually invoked in extraordinary circumstances. Bankers Life & Casualty Co. v. Holland, 346 U.S 379, 382-85 (1953); *see also* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943) (stating that the writ has been used in federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so").

128. *Rhone-Poulenc*, 51 F.3d at 1304.

129. *Id.* at 1298.

130. *Id.*

131. *Id.* at 1299.

132. *Id.* at 1300.

133. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

134. *Id.*

135. *Id.*

136. 304 U.S. 64, 78-80 (1938). Judge Posner also reasoned that Judge Grady's certification order would subject the first jury's finding to reevaluation by other juries, when successive juries determined issues such as comparative negligence and proximate cause. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302-03 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). Thus, he argued that defendants would be deprived of their Seventh Amendment rights. *Id.* According to one commentator, "This Seventh Amendment objection seems a weak argument, as a series of circuit court decisions have approved the use of successive juries to determine different questions, and Rule 23(c)(4)(A) explicitly contemplates use of such a procedure." Coffee, *supra* note 2, at

Judge Posner concluded that although the class action device may be appropriate to resolve certain mass product liability claims, exemplified by the asbestos litigation, the AHF litigation did not warrant invocation of Rule 23.[137] He determined that the AHF litigation simply did not create sufficient pressure on the federal court system.[138]

Following the Seventh Circuit decision, the plaintiffs petitioned for a writ of certiorari to the United States Supreme Court seeking a reversal of Judge Posner's issuance of a writ of mandamus to decertify the class. On October 5, 1995, the Supreme Court denied certiorari, effectively permitting Judge Posner's decision to stand.[139]

As a result of the decertification of the class in *Rhone-Poulenc*, the case will remain consolidated for pretrial proceedings in the Seventh Circuit under 28 U.S.C. § 1407. Each individual case, however, will return to its transferor court for individual trial.[140] Thus, *Rhone-Poulenc* may take its place among the numerous mass product liability claims in which courts have denied requests for class certification.[141]

### D. Rhone-Poulenc *Follows History of Failures To Certify*

Rules 23(b)(3) and 23(c)(4) authorized the court in *Rhone-Poulenc* to certify a class action for the resolution of common issues. Judge Posner declined to permit the district court to use a tool provided to the courts to manage exactly this type of complex litigation. The *Rhone-Poulenc* case is far from anomalous. Many judges faced with mass product liability actions have similarly failed to take advantage of the Rule 23(b)(3) mechanism. The next part explores the ostensible reasons behind the courts' reluctance to exploit this tool in other mass exposure cases.

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1440 (citing Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 693 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977)). In *Arthur Young*, the Ninth Circuit stated that the right to a unitary trial is not absolute and only applies if the issues proposed to be bifurcated are " 'so interwoven . . . that the [one] cannot be submitted to the jury independently of the [other] without confusion and uncertainty which would amount to a denial of a fair trial.' " *Arthur Young*, 549 F.2d at 693 (quoting United Airlines, Inc. v. Weiner, 286 F.2d 302, 306 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961)).

137. *See Rhone-Poulenc*, 51 F.3d at 1304.

138. *See id.*

139. Grady v. Rhone-Poulenc Rorer, Inc., 116 S. Ct. 184 (1995).

140. *See* 28 U.S.C. § 1407 (1994).

141. *See, e.g.*, *In re* Northern Dist. Of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), (regarding IUDs), *cert. denied*, 459 U.S. 1171 (1983); *In re* Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985) (regarding tetracycline); Caruso v. Celsius Insulation Resources, Inc., 101 F.R.D. 530 (M.D. Pa. 1984) (regarding urea formaldehyde); Mertens v. Abbott Labs., 99 F.R.D. 38 (D.N.H. 1983) (regarding DES); Sanders v. Tailored Chem. Corp., 570 F. Supp. 1543 (E.D. Pa. 1983) (regarding urea formaldehyde insulation); McElhaney v. Eli Lilly & Co., 93 F.R.D. 875 (D.S.D. 1982) (regarding DES); Ryan v. Eli Lilly & Co., 84 F.R.D. 230 (D.S.C. 1979) (same); Yandle v. PPG Indus., 65 F.R.D. 566 (E.D. Tex. 1974) (regarding asbestos); Rosenfeld v. A.H. Robins Co., 407 N.Y.S.2d 196 (App. Div. 1978) (regarding Dalkon Shield).

## II. COMMON MISPERCEPTIONS REGARDING RULE 23(b)(3) CLASS ACTIONS IN THE MASS PRODUCT LIABILITY CONTEXT

Courts have generally been reluctant to certify class actions in the mass product liability context under Rule 23(b)(3).[142] In refusing to certify class actions, these courts have invoked various practical and policy concerns regarding this aggregative technique. This part discusses these concerns.

### A. *The 1966 Amendment to Rule 23*

Some courts trace their reluctance to apply Rule 23 to mass exposure cases to the Advisory Committee Notes (the "Notes") that accompanied the 1966 amendment to Rule 23.[143] The Notes stated: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."[144]

The Notes embraced the view that certification of class actions for mass tort litigation was not feasible because inevitably individual questions would require separate trials.[145] Many courts have adopted this rationale and accordingly invoked the Notes as their justification for refusing to certify class actions.[146] For instance, in *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*,[147] the court decertified a class that had been conditionally certified by the district court.[148] In explaining its decision, the Ninth Circuit relied partially upon the Notes.[149] The court agreed with the Notes that "[i]n products liability actions . . . individual issues may outnumber common issues."[150] The Notes thus offer one explanation for courts' hesitancy to certify class actions in mass exposure cases.

### B. *The Theory of Individual Justice*

The most traditional objection to utilizing class actions to resolve mass product liability claims is that the device violates the notion that

142. Newberg & Conte, *supra* note 43, § 17.02, at 17-6.
143. Schultz, *supra* note 16, at 556 n.13.
144. Fed. R. Civ. P. 23(b)(3), advisory committee's note (1966 amendment).
145. *Id.*
146. *See* Causey v. Pan Am. World Airways, 66 F.R.D. 392, 397, 399 (E.D. Va. 1975) (denying plaintiffs' motion for class certification of airplane cases, taking the Notes into consideration); Yandle v. PPG Indus., 65 F.R.D. 566, 569, 572 (E.D. Tex. 1974) (denying class certification in asbestos litigation, taking the Notes into consideration).
147. 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).
148. *Id.* at 856-57.
149. *Id.* at 852-853.
150. *Id.* at 853.

individuals should be free to pursue their own litigation.[151] Courts have been generally hesitant to certify mass product liability claims that involve severe personal injury or death.[152] The rationale underlying this policy is the belief that in serious cases involving very personal issues, plaintiffs should have control over their own litigation.[153] Traditionally, courts have disfavored class actions because of a perception that such actions sacrifice individuals' control over their suits by forcing them to participate in a large mass product liability class.[154] In *Yandle v. PPG Industries*,[155] which involved a suit brought by former asbestos plant employees, the court noted the "general feeling that when personal injuries are involved . . . each person should have the right to prosecute his own claim and be represented by the lawyer of his choice."[156]

Proponents of individual justice also argue that certification of class actions may disadvantage some plaintiffs because conveying individual damages to a jury may be difficult and yield uncertain results when a joint class action trial with a bifurcated damages procedure is involved.[157] Moreover, plaintiffs may be unable to obtain the quick settlements that might be available in individual suits[158] because Rule 23(e) requires court approval of class-wide voluntary dismissals or settlements.[159]

An additional consideration that has led courts to disfavor class certification is that the judiciary possesses other tools to manage mass tort litigation that courts have perceived as comporting better with traditional notions of individual justice.[160] For instance, courts can appoint special masters to promote efficient resolution of cases.[161] Courts may also consolidate cases under Rule 42(a) of the Federal

151. *See* Newberg & Conte, *supra* note 43, § 17.02, at 17-7 to 17-8.

152. *Id.* at 17-7.

153. *See id.*; *see also* Causey v. Pan Am. World Airways, 66 F.R.D. 392, 399 (E.D. Va. 1975) (acknowledging plaintiffs' strong interests in controlling their own causes of actions in mass accident cases); Hobbs v. Northeast Airlines, 50 F.R.D. 76, 79 (E.D. Pa. 1970) (explaining that in usual class action suits "individual claims are usually somewhat peripheral to the lives of the claimants").

154. *See* Schultz, *supra* note 16, at 595-96; Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 71.

155. 65 F.R.D. 566 (E.D. Tex. 1974).

156. *Id.* at 569; *see also* Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970) (denying class certification because air crash cases are different from "the usual class action, where individual claims are usually somewhat peripheral to the lives of the claimants").

157. Newberg & Conte, *supra* note 43, § 17.02, at 17-9.

158. *Id.*

159. Fed. R. Civ. P. 23(e).

160. Newberg & Conte, *supra* note 43, § 17.02, at 17-6.

161. *See* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev. 394, 395-98 (1986). A court may appoint a special master to act as the representative of the court in litigation, usually to hear and determine pretrial matters. A federal judge has the authority to appoint a special master under 28 U.S.C. § 636.

Rules of Civil Procedure[162] or encourage litigants to use the test case approach.[163]

Courts view personal injury claims, because of their personal nature and severity, as especially deserving of individual treatment. As a result, courts often do not certify class actions in mass product liability cases out of respect for the notion of individual justice.

### C. *The Determination of Applicable Law*

The Supreme Court, in *Erie R.R. Co. v. Tompkins*,[164] prohibited a federal court sitting in diversity from applying a federal common law in lieu of the state substantive law that would apply if the case were being tried in state court.[165] As a result, a federal court sitting in diversity must behave exactly as a state court would; it must apply the substantive law indicated by the choice of law of the state in which it sits.[166] Moreover, in *Van Dusen v. Barrack*,[167] the Supreme Court held that if a defendant seeks to transfer an action under 28 U.S.C. § 1404(a) to another venue, the transferee federal court should apply the substantive law of the state in which the transferor court sits, including that state's choice of law rules.[168] As a result, in the mass

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162. Fed. R. Civ. P. 42(a). Rule 42 provides in pertinent part:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

*Id.* A court may order several actions to be united if all actions are between the same parties, pending in the same court, and involve substantially the same subject-matter, issues, and defenses.

163. Newberg & Conte, *supra* note 43, § 17.02, at 17-6. Under the test case approach, one lawsuit is brought to establish a legal principle or right that would bind others involved in similar cases. The test case is selected out of a number of suits brought by several plaintiffs against similarly situated defendants that involve the same questions and evidence. The case then goes first to trial and its decision serves as a test of the other plaintiffs' right to recover.

164. 304 U.S. 64 (1938).

165. *Id.* at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law."). The *Erie* doctrine applies to nationwide class actions. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

166. The federal court sitting in diversity must apply the choice of law of the state in which it sits. Van Dusen v. Barrack, 376 U.S. 612, 628 (1964); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). A state must recognize the sovereignty of the laws of its sister states. Restatement of Conflict of Laws § 1(1), § 42 cmt. a (1934). For a discussion of the problem of determining applicable law in mass tort litigation, see Linda S. Mullenix, *Mass Tort Litigation and The Dilemma of Federalization*, 44 DePaul L. Rev. 755, 788 (1995) ("In short, in the absence of a federalized choice-of-law scheme for mass tort litigation (or federal substantive mass tort standards), federal judges must determine on a case-by-case basis the applicable state substantive law in each new mass tort litigation.").

167. 376 U.S. 612 (1964).

168. *Id.* at 627-30.

product liability context a single law almost never controls a mass product liability claim[169] because the consolidated suits arose in various fora throughout the nation; thus numerous state substantive laws and choice of law rules typically apply.[170]

The Supreme Court recently confronted the choice of law problem present in many class actions in *Phillips Petroleum Co. v. Shutts*.[171] In *Shutts*, the Court held that a Kansas state court could not apply Kansas law to all plaintiffs involved in a class action brought against a gas company by its investors to recover interest on royalties suspended pending final administrative approval of gas price increases.[172] After an inquiry to determine whether Kansas law materially conflicted with any other applicable law, the Court found that differences among the applicable laws of Texas, Oklahoma, and Louisiana could substantially affect the defendants' liability.[173] Thus, the Court held that Kansas could not apply its law to all parties because it "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."[174] In reaching its decision, the Court substantially relied upon *Allstate Insurance Co. v. Hague*,[175] in which the court had held that a state must have a significant contact or an aggregation of contacts to apply its own substantive law in a constitutionally permissible manner to prevent such a choice of law from being arbitrary or unfair.[176] Thus, the Supreme Court has consistently prohibited courts from artificially simplifying the law applicable to a complex action; the requirement that courts apply a multiplicity of choice of law provisions, as well as substantive laws, can strip away some of the advantages of a class action.[177]

In *Rhone-Poulenc*, Judge Posner concluded that certification of a class action, as Judge Grady envisioned it, would violate the *Erie* doctrine.[178] He reasoned that Judge Grady's decision to apply a single negligence standard to the manufacturers of AHF would in effect create a general federal common law of negligence—a development pro-

169. *See* Mullenix, *supra* note 166, at 785. While this rule holds true for mass product liability cases, cases involving mass accident claims usually will be decided according to the law of the state in which the accident occurred.

170. *See In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 755 (E.D.N.Y. 1984) (wrestling with the search for a single standard in a mass tort case), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

171. 472 U.S. 797 (1995).

172. *Id.* at 818, 822-23.

173. *Id.* at 816-18.

174. *Id.* at 822.

175. 449 U.S. 302 (1981).

176. *Id.* at 312-13.

177. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 13-14 (1986).

178. *See supra* notes 164-65 and accompanying text.

hibited by *Erie*.[179] In *In re School Asbestos Litigation*,[180] the Third Circuit expressed similar fears regarding a class certified to resolve claims against asbestos manufacturers.[181] The Third Circuit noted that "the dictates of state law may not be buried under the vast expanse of a federal class action. The parties' rights under state substantive law must be respected, and if that is not possible in a class action, then that procedure may not be used."[182]

In mass product liability actions that involve the laws of various states, the *Erie* doctrine creates a significant obstacle to employing a uniform negligence law. Fearing that a class action would become unmanageable[183] if it required the application of different state substantive laws, courts disfavor class certification in the mass product liability context.

### D. *The Creation of Intolerable Financial Risks and Settlement Pressure on Defendants*

Class actions create a greater risk that defendants will be subject to mass liability than if individual suits are brought against them. Courts have acknowledged the increased pressure to settle that is placed upon defendants faced with enormous potential liability due to class certification.[184] Courts that have refused to certify classes for mass

179. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1301 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). Judge Grady argued that a jury could determine whether the defendants took due care under one general standard because no substantial variations distinguished the tort rules of different states. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 419 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995); *see also In re* Diamond Shamrock Chemical Co., 725 F.2d 858, 861 (2d Cir.) (stating that a jury hearing the Agent Orange litigation may be asked whether the defendants took due care because the different tort rules of different states would not substantially differ), *cert. denied*, 465 U.S. 1067 (1984). Judge Grady further asserted that the defendants have not pointed to any substantial difference between the negligence laws of the 50 states except the distinction made by several states between ordinary negligence or the professional standard of care. *Wadleigh*, 157 F.R.D. at 419. Judge Grady expressed that those differences could be minimized by means of a jury instruction. *Id.*

Judge Posner argued, however, that the law of negligence may differ significantly between states. For instance, the "serendipity" theory appears to dispense with the foreseeability factor because the victims of HIV infection were not foreseeable. *Rhone-Poulenc*, 51 F.3d at 1301. In states that incorporate foreseeability of the risk into the test for negligence, the "serendipity theory" would fail. *Id.* In states that do not incorporate the foreseeability factor, the "serendipity theory" may succeed. *Id.* As a result, if a federal court applied one negligence standard it would be ignoring state substantive law and instead be promoting a federal common law in its place which clearly violates *Erie*.

180. 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

181. *Id.* at 1007.

182. *Id.*

183. The manageability of a class action is relevant to the determination of whether the class action vehicle is a superior method to resolve a suit.

184. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

product liability claims are often fearful of forcing defendants to accept "blackmail settlements" in the face of exposure to mass liability although the plaintiffs' claim may lack legal merit.[185] The court in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*[186] considered whether to uphold a settlement class in a multidistrict product liability action charging General Motors with manufacturing defective fuel tanks that exploded during low impact car accidents.[187] In *General Motors*, the Third Circuit deplored the potential of class actions as creating "the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth."[188]

In *Rhone-Poulenc*, Judge Posner reasoned that certification of the potential class would subject the defendants to intolerable settlement pressure.[189] He indicated that this pressure was especially inappropriate in light of the defendants' record of winning twelve of the first thirteen cases litigated.[190] Judge Posner seemed to have taken the plaintiffs' losing record to indicate that the defendants were likely to win most of the remaining individual cases.[191] He estimated that if the suits were resolved individually, the defendants would probably have to pay damages in roughly twenty-five of the 300 individual remaining cases, with potential liability capped at $125 million.[192] He explained that if the plaintiff class was certified, the defendants could potentially face a significantly greater number of plaintiffs who would seek to capitalize on the opportunity provided by one jury verdict that might find the defendants liable.[193] Judge Posner feared that the magnitude of this potential liability might cause the defendants to eliminate this risk by electing to settle the cases although claims asserted against

185. *Id.*; *see also* Owen M. Fiss, *Against Settlement*, 93 Yale L. J. 1073, 1075 (1984) (stating that settlement is a problematic technique because: "Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.").

186. 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

187. *Id.* at 777-79.

188. *Id.* at 784-85. In *General Motors*, the court refused to certify a settlement class action because "the settlement [was] not fair and adequate; more precisely . . . the district court erred in accepting plaintiffs' unreasonably high estimate of the settlement's worth, in over-estimating the risk of maintaining class status and of establishing liability and damages, and in misinterpreting the reaction of the class." *Id.* at 779.

189. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). For a discussion regarding incentives to settle that are present in mass tort litigation, see Kenneth R. Feinberg, *Claims Resolution Facilities and the Mass Settlement of Mass Torts*, Law & Contemp. Probs., Autumn 1990, at 79, 80-84.

190. *Rhone-Poulenc*, 51 F.3d at 1298.

191. *Id.*

192. *Id.* His estimate was based on the plaintiffs' record in previous trials.

193. *Id.*

them may lack merit.[194] He viewed a settlement reached under these circumstances as suspect.[195]

In *Rhone-Poulenc*, Judge Posner also expressed concern that class certification might force defendants into bankruptcy.[196] Judge Posner did not wish to certify a class if doing so would force "defendants to stake their companies on the outcome of a single jury trial."[197]

Thus, some courts hesitate to certify class actions because they wish to protect defendants from extortionate settlements accepted merely to avoid the risk of mass liability and the expenses of defending numerous claims that lack legal merit. Moreover, some courts seek to protect defendant companies from the financial ruin inherent in mass liability. As a result, these courts may deny class certification in the mass product liability context.

### E. *The Temptation to Unethical Behavior*

An additional reason cited by courts for declining to certify class actions is the belief that class certification encourages unethical behavior by attorneys involved in the litigation.[198] The nature of the class action device may create several different types of incentives for corrupt behavior.

Class action suits are believed to encourage claim solicitation.[199] In *Hobbs v. Northeast Airlines*,[200] the court stated, "At first blush, the use of the class action device in personal injury litigation seems to contain at least the suggestion of improper claim solicitation."[201]

194. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

195. *Id.* (citing Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973)). For discussions of class certification and the pressure on defendants to settle, see Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 Cardozo L. Rev. 1755, 1780-82 (1994); Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 963, 973 n.38 (1994); Milton Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 8-9 (1971); Charles D. Schoor, *Class Actions: The Right to Solicit*, 16 Santa Clara L. Rev. 215, 239-40 & n.82 (1976); Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 Yale L.J. 590, 605 n.67 (1982).

196. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

197. *Id.*

198. Newberg & Conte, *supra* note 43, § 17.02, at 17-8.

199. Yandle v. PPG Indus., 65 F.R.D. 566, 569 (E.D. Tex. 1974). The *Yandle* court cited this concern as an additional factor that militated against certifying a class action to resolve claims against manufacturers of asbestos. *Id.*

200. 50 F.R.D. 76 (E.D. Pa. 1970).

201. *Id.* at 78.

Even courts that have certified class actions have noted their awareness of the potential for this abuse.[202]

Another danger of class certification is that attorneys representing plaintiffs pursuant to contingent fee arrangements may include a large number of claims, even if some claims are weak, in the hopes of reaching a package settlement.[203] Moreover, class actions present the opportunity for plaintiffs' and defendants' attorneys to strike a "sweetheart" settlement, in which the attorneys for the plaintiff class settle the claim prematurely to ensure that they recover their fees, although the plaintiffs have a strong likelihood of prevailing at trial or attaining a more beneficial settlement.[204]

In addition, the nature of mass tort litigation has created two types of plaintiffs' firms that specialize in this type of suit. Both types of firms have been subject to criticism by commentators for improperly handling mass exposure cases.[205] The first type consists of "boutique firms" that screen clients and only bring actions on behalf of those severely injured plaintiffs who may seek high damages.[206] These firms receive criticism for turning away clients with meritorious claims merely because they will not generate an adequate profit for the firm. The second type consists of "wholesalers," which represent a large number of claimants but invest few resources into individual cases.[207] As a result, these firms cut corners in their case preparation and may prejudice particular plaintiffs who have stronger claims than others.[208]

Lastly, class actions in the mass product liability context are also perceived as creating an incentive for attorneys to attain benefits for their clients at the expense of future claimants.[209] Courts find this problematic because no guarantee exists that the interests of the future members will receive adequate protection or fair treatment.[210] Future claims are exceptionally difficult because courts are often un-

202. *See, e.g.*, Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 559 (S.D. Fla. 1973) (stating that it was "aware of the potential for abuse that exists whenever a class action arises"), *aff'd mem.*, 507 F.2d 1278 (5th Cir. 1975).

203. Feinberg, *supra* note 189, at 83.

204. *Individual Justice*, *supra* note 26, at 584.

205. *See, e.g.*, Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. Times, Mar. 24, 1995, at B6 (recounting settlement negotiations that may have compromised individual claims and violated ethical obligations).

206. *See* Coffee, *supra* note 2, at 1365.

207. *Id.*

208. *See id.*

209. *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir.) (questioning how "the due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation"), *cert. denied*, 116 S. Ct. 88 (1995).

210. *See* Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 Cornell L. Rev. 858, 886-87 (1995) ("The petition for certiorari filed by the *Agent Orange* claimants, for example, said that the consequence of including their claims was 'brutalizing individual rights.' " (citation omitted)).

able to determine how many claimants have been exposed to a product, how many will suffer harm, and what their damages will be.[211]

As a result, "there remains an overarching concern—that absentees' interests are being resolved and quite possibly bound by the operation of res judicata even though most of the plaintiffs are not the real parties to the suit."[212] Accordingly, courts have been hesitant to certify class actions if they believe that certification would disadvantage future claimants.

### F. *The Lack of Finality*

Rule 23(b)(3) class actions in particular have engendered criticism for not providing final resolutions because this type of class action allows class members to opt out and bring individual claims.[213] The opt out provision of Rule 23(c)(2) limits the courts' ability to achieve global solutions in mass product liability litigation under Rule 23(b)(3).[214] Thus, defendants have a strong incentive to resist class certification because their exposure to liability does not end with the resolution of the class action suit.

## III. Rule 23 Redux: Answers to Commonly Raised Objections to Class Certification

Individually and collectively, the objections to the use of Rule 23(b)(3) reduce courts' willingness to invoke the class action vehicle in mass product liability litigation. When considering whether to certify a class, courts must confront numerous issues, including: the Notes to Rule 23 which caution against utilizing the class action device in mass tort litigation; a multiplicity of applicable state laws; the adequate protection of the interests of future claimants; concepts of individual justice; the risk that plaintiffs' attorneys will engage in collusion; and intolerable settlement pressure on defendants. As a result, courts fail to take full advantage of Rule 23(b)(3) in mass exposure cases.

A closer examination, however, reveals that none of these objections is insurmountable in light of the courts' powers under Rule 23, including the courts' authority to grant partial certification of classes with respect to certain issues and to certify subclasses. This part offers

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211. Hensler & Peterson, *supra* note 1, at 1048.

212. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

213. *See* Fed. R. Civ. P. 23(c)(2) (granting opt out in class actions maintained under 23(b)(3)); Weinstein, *supra* note 30, at 135; *see also* Feinberg, *supra* note 189, at 87 (stating that one of the problems of voluntary class actions is that plaintiffs have a right to opt out).

214. Weinstein, *supra* note 30, at 135; *see also* Valle Simms Dutcher, Comment, *The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases*, 10 Pace Envtl. L. Rev. 955, 951 (1993) (recounting that in the Dalkon Shield litigation, the plaintiffs' counsel stated that they would recommend that their clients opt out of the class if class certification were upheld).

answers to these commonly raised concerns. As this part demonstrates, many of the most common objections to class certification are misperceptions. Furthermore, courts have at their disposal the means to ensure that their concerns are met.

### A. *The 1966 Amendment to Rule 23*

Many courts have cited the Notes accompanying the 1966 Amendment to Rule 23 as the basis for denying class certification under Rule 23(b)(3).[215] The Notes have been the subject of considerable criticism by courts and legal commentators, however, including the authors of the original Notes.[216]

In *In re School Asbestos Litigation*,[217] the Third Circuit upheld the certification of a Rule 23(b)(3) class action to resolve asbestos claims notwithstanding the Notes.[218] The Third Circuit reasoned that in light of the tremendous economies that may be achieved through class certification, reliance upon the rationale of the Notes should be reassessed. Accordingly, the Third Circuit upheld the district court's certification of a Rule 23(b)(3) class action.[219]

Moreover, Rule 23 provides an avenue for courts to avoid the very problems that motivated the Advisory Committee to include the Notes in the Amendment to Rule 23. The Notes specifically seek to prevent class certification if individual issues will eventually degenerate the class action suit into multiple lawsuits tried separately.[220] Under Rule 23(c)(4)(A), however, a court may partially certify a class only to resolve certain issues.[221] Consequently, a court may determine what issues are common to all class members, and exclusively certify a

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215. *See supra* notes 143-50 and accompanying text.

216. *See, e.g.*, Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 Harv. J. on Legis. 461, 461-62 (1988) (praising judges who have certified class actions in the mass product liability context despite the admonition of Rule 23, because the Notes do not recognize the practical problems inherent in bringing individual actions in mass tort litigation). One member of the advisory committee has stated:

> I was an ex officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that that is untrue. Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of the mass repetitive wrong that we see in this case and so many others that have been mentioned this morning and afternoon.

Charles Alan Wright, *In re* School Asbestos Litigation Master File 830268 (E.D. Pa.) Class Action Argument, July 30, 1984, *in* Newberg & Conte, *supra* note 43, § 17.06, at 17-20.

217. 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

218. *Id.* at 1008-19.

219. *Id.*

220. Fed. R. Civ. P. 23 (b)(3), advisory committee's notes (1966 amendment).

221. Fed. R. Civ. P. 23(c)(4)(A).

class to determine those questions. The court could refuse to certify issues that require independent treatment, such as determining individual damages and proximate cause.

Thus, courts have recognized that the efficiency of Rule 23 may warrant a reassessment of the continuing vitality of the Notes. Moreover, courts may partially certify classes to resolve common issues, to account for the underlying concerns of the Notes' authors. Accordingly, courts should not perceive the Notes as a bar to employing Rule 23(b)(3) in mass product liability litigation.

### B. *The Theory of Individual Justice*

Another frequently cited objection to class certification is that it sacrifices individuals' control over their suits because they are forced to participate in a large mass tort class.[222] This argument ignores the reality that clients often lack independent control over their suits, even in the absence of a certified class action.[223] "Almost everyone who has had contact with plaintiffs of tort litigation at the trial court level would admit that, ultimately, everyone and everything *but* the injured plaintiff controls the litigation."[224]

This objection is also overcome by the plaintiffs' opportunity to protect themselves by opting out under the provisions of Rule 23(c)(2).[225] Furthermore, if a court chooses only to certify certain issues under Rule 23(c)(4)(A), individuals will retain independent control over all other aspects of their litigation except the issue certified. For example, if a court certifies a class to resolve only the negligence of the manufacturers at relevant times, individuals would maintain control over aspects of their suit such as damage determinations and findings of proximate cause. Accordingly, courts should not view the loss of individual control over a plaintiff's suit as a meaningful obstacle to certifying class actions.

### C. *The Determination of Applicable Law*

A difficult issue that arises in mass product liability litigation is determining which substantive law to apply. In mass product liability cases, geographic diversity may exist between both defendants and plaintiffs and among individual plaintiff class members. As a result, various states' substantive law may be applicable to a single litiga-

222. Schultz, *supra* note 16, at 595-96; Transgrud, *supra* note 154, at 74-75.

223. *See* Schultz, *supra* note 16, at 595-96 (finding that the majority of mass tort plaintiffs felt they had little or no control over the handling of their cases).

224. Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 330 n.23 (1983).

225. *See* Fed. R. Civ. P. 23(c)(2); Weinstein, *supra* note 30, at 134-35.

tion.[226] A federal court can, however, certify subclasses using Rule 23(c)(4)(B) to account for variances in state law.[227] The court in *In re School Asbestos Litigation* indicated its willingness to certify subclasses based on distinctions in state law as the need arose.[228] Although the Third Circuit acknowledged the complexity that the district court would encounter in applying various state laws, the circuit court believed that "the effort may nonetheless prove successful."[229]

The court in *In re Copley Pharmaceutical, Inc.*[230] concurred with the Third Circuit's view. In *Copley*, the court reevaluated its decision to certify a class of plaintiffs suing the manufacturers of an asthma drug in light of *Rhone-Poulenc*.[231] The court stated that certain difficulties "will be encountered in trying to condense the negligence standards of different jurisdictions, but classes based on such standards have been certified before."[232]

Additionally, in *Phillips Petroleum Co. v. Shutts*,[233] the Supreme Court stated that "We must first determine whether [a state's] law conflicts in any material way with any other law which could apply. There can be no injury in applying [a state's] law if it is not in conflict with that of any other jurisdiction connected to this suit."[234] As a re-

226. *See* Mullinex, *supra* note 166, at 785 (noting that "theoretically, it is possible for the law of all fifty states to be available in [a] consolidated federal diversity mass tort [case]").

227. Castano v. American Tobacco Co., 160 F.R.D. 544, 554 (E.D. La. 1995) (noting that Rule 23(c)(4)(B) "provides the Court with the option of dividing the class into subclasses if appropriate after the Court resolves the conflict of laws issue").

228. *See In re* School Asbestos Litig., 789 F.2d 996, 999 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986) (*Asbestos* II). Arguably, that need will not arise often. *See In re* School Asbestos Litig., 104 F.R.D. 422, 434 (E.D. Pa. 1984) (*Asbestos* I) (stating that "51 jurisdictions are in virtual agreement that they apply the Restatement (Second) of Torts § 388"), *modified*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986); *In re* Lilco Securities Litig., 111 F.R.D. 663, 670 (E.D.N.Y. 1986) (stating that applying the law of all 50 states does not make class per se unmanageable).

229. *Asbestos II*, 789 F.2d at 1010-11; *see also Asbestos I*, 104 F.R.D. at 434 (holding that "substantial duplication" of negligence and strict liability laws in 51 jurisdictions does not make nationwide class unmanageable). As a result, in *Rhone-Poulenc*, Judge Grady could have certified subclasses of plaintiffs if the defendants could point out any difference in negligence standards among the 50 states. Judge Grady was already prepared to certify subclasses to account for the variation between states that adhere to a professional standard of negligence and those that provide for an ordinary standard of care.

230. 161 F.R.D. 456 (D. Wyo. 1995).

231. *Id.* at 460-61.

232. *Id.* at 461. Moreover, the court noted that even Judge Posner conceded that, at some level, the law of negligence is not only nationwide, but worldwide. *Id.* at 460-61.

233. 472 U.S. 797 (1985).

234. *Id.* at 816. In a case following *Shutts*, the Supreme Court held that Kansas did not violate its constitutional obligation to apply the substantive law of another state because it viewed the other state's law as unestablished. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 731 (1988). Justice O'Connor dissented from this part of the opinion, criticizing the majority's reasoning. O'Connor argued that the Court's decision would permit a court that did not like another state's law to avoid applying it by inventing a

sult, in the absence of a material conflict between state laws no constitutional roadblock precludes the use of a uniform law.

Thus, two alternative avenues exist to certify Rule 23(b)(3) class actions in mass product liability suits without offending the principles of *Erie* or *Shutts*. First, if applicable law does not materially conflict with that of other states, *Shutts* permits the use of a unified legal standard. Alternatively, if state laws do materially vary, a court could certify subclasses under Rule 23(c)(4)(B) to account for these variations.

### D. *The Protection of Defendants from Settlement Pressure and Fiscal Detriment*

Courts and legal commentators have also cited the need to protect defendants against "blackmail settlements" and bankruptcy as factors militating against allowing class action treatment in mass product liability litigation.[235] For example, in *Rhone-Poulenc*, Judge Posner expressed concern that certification of a class action would subject the defendants to intolerable settlement pressure and possible bankruptcy.[236] He was particularly concerned with these possibilities because he doubted the merit of the plaintiffs' claim.[237]

Judge Posner's concerns about blackmail settlements are open to more than one interpretation. Arguably, Judge Posner evaluated the merits of the case under Rule 23(b)(3) as only one factor involved in the determination of whether the class action vehicle was a superior method to resolve the controversy.[238] Judge Posner apparently reasoned that class action treatment would give undue weight to a potential single victory for plaintiffs; the corresponding increase in defendants' risk would lead them to accept an extortionate settlement. He indicated that individual actions taking place in various districts nationwide would achieve a more representative national consensus on whether plaintiffs had suffered a legally cognizable injury.[239]

Judge Posner's reasoning, however, ignores the leverage that plaintiffs already enjoy under the doctrine of nonmutual collateral estoppel. Offensive nonmutual collateral estoppel permits all later

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novel legal theory that the state had not considered and predict that the state would adopt that theory. *Id.* at 749.

235. *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-1300 (7th Cir.) (noting that the "small probability of an immense judgment in a class action" may lead to "an intense pressure to settle"), *cert. denied*, 116 S. Ct. 184 (1995); Fiss, *supra* note 185, at 1075.

236. 51 F.3d at 1298. Notably, intolerable settlement pressure only exists in cases that defendants feel compelled to settle a case that lacks legal merit, or for a higher amount than the actual claims are worth. Settlement pressure is proper, however, if the amount of damage requested is reflective of the defendants' responsibility.

237. *See id.*

238. Coffee, *supra* note 2, at 1438-39.

239. 51 F.3d at 1298-1300.

plaintiffs to take advantage of a single victory.[240] At least in a class action, however, defendants are aware that the entire controversy is at stake and can deploy their resources and assess their risks accordingly. Further, if defendants win the class action, all plaintiffs are bound unless they exercised their right to opt out.

One district court has subsequently determined that Judge Posner's concern that class certification placed the fate of an industry in a single jury's hands "is not a legal basis" for denying class certification under Rule 23(b)(3).[241] In *In re Copley Pharmaceutical, Inc.*,[242] the court criticized Judge Posner's solicitude for defendants' economic welfare as evidence of a "profound mistrust of the jury system."[243]

In fact, Judge Posner may have usurped the jury's function altogether. An alternative analysis of his preoccupation with the plaintiffs' losing record arguably indicates that what Judge Posner really did was prematurely and improperly decide the merits of the case. The Supreme Court specifically prohibited this type of preliminary merits inquiry in *Eisen v. Carlisle & Jacquelin*.[244] In *Eisen*, the Court stated:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it.[245]

Thus, Judge Posner's reasoning may run afoul of *Eisen*.

Regardless of whether Judge Posner's concern for the merits of the plaintiffs' case is proper, the Seventh Circuit could have assuaged its concern for "blackmail settlements" by employing alternative procedures to combat intolerable settlement pressure.[246] The Seventh Cir-

240. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979). In *Parklane*, the Supreme Court stated that offensive nonmutual collateral estoppel may be applied if the plaintiff could not have easily joined in the earlier action and if application of the doctrine would not be unfair to the defendant. *Id.* The court listed several factors that would mitigate against the use of nonmutual collateral estoppel: (1) the existence of "wait and see" plaintiffs; (2) the defendants were only sued for small or nominal damages in the first suit and had little incentive to defend vigorously; (3) the judgment is inconsistent with other judgments in favor of the defendants; or (4) procedural opportunities are available in the subsequent actions that were not available in the first. *Id.* at 330-21.

241. *In re* Copley Pharmaceutical, Inc., 161 F.R.D. 456, 460 (D. Wyo. 1995).

242. 161 F.R.D. 456 (D. Wyo. 1995).

243. *Id.* at 460 n.4.

244. 417 U.S. 156 (1974).

245. *Id.* at 177-78; *see also Copley*, 161 F.R.D. at 460 (stating that the merits of plaintiffs claim cannot be considered when determining whether to certify a class action).

246. *Class Actions—Class Certification of Mass Torts—Seventh Circuit Overturns Rule 23(b)(3) Certification of a Plaintiff Class of Hemophiliacs*—In re Rhone-Poulenc Rorer, Inc., *51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995)*, 109 Harv. L. Rev. 870, 874 (1996).

cuit could have encouraged district courts to use summary judgment more freely to dispose of claims that lack legal merit.[247] Moreover, the Seventh Circuit could have instructed district courts to scrutinize any proposed settlement closely pursuant to the authority of Rule 23(e) and by that means reject a settlement that resulted from inappropriate pressure or tactics.[248] While protecting defendants from extortionate settlements is an important interest, courts should not ignore alternative means to combat possible "blackmail settlements" in favor of denial of the class action vehicle to plaintiffs in the absence of any evidence of an intent to exact such a settlement.

### E. *The Incentives for Unethical Behavior*

The additional concern that class certification creates incentives for attorneys to engage in unethical behavior is overstated. Courts should not assume that class actions will lay the foundation for unethical behavior, including claim solicitation, collusion, or improperly disadvantaging future claimants. Active judicial oversight of a class action may prevent these abuses.

In fact, judges are less able to identify and correct these problems in individual suits. If a class action is certified under the power of one judge in one court, that judge will be in a superior position to identify these abuses or prevent them from occurring. For instance, under Rule 23(e), judges must approve of any settlements between the parties.[249] The Third Circuit has recognized that the "expanded role of the court in class actions . . . continues even after certification."[250] Thus, judges presiding over a class action may reject a settlement if they believe the attorneys engaged in unethical behavior during settlement negotiations or acted to prejudice the interests of their clients.[251]

A judge may similarly protect the interests of future claimants under Rule 23(e).[252] A judge may choose to reject a settlement that

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247. *Id.*

248. *Id.* at 875.

249. *See* Fed. R. Civ. P. 23(e); Weinstein, *supra* note 135, at 136 (stating that "the class action explicitly provides for judicial supervision to ensure some degree of fairness and control over attorneys' fees . . . the judge can ensure . . . fees [are] commensurate to the savings that economies of scale of shared discovery, experts, and so on should engender"). Moreover, courts must decide whether a settlement is fair, reasonable, and adequate. *See, e.g.*, West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1085 (2d Cir.) (noting that '[t]hese terms are general and can not be measured scientifically"), *cert. denied*, 404 U.S. 871 (1971).

250. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 785 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

251. *See id.* ("Courts and commentators have interpreted this rule to require courts to 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.' " (quoting Newberg & Conte, *supra* note 43, § 11.41, at 11-88 to 11-89)).

252. *See* Fed. R. Civ. P. 23(e); *General Motors*, 55 F.3d at 785 ("Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of

trammels the interests of future claimants.[253] In addition, a class action suit may protect future claimants by avoiding a race to judgment that occurs as the result of individual adjudication. If cases are individually tried, the first big judgment could deplete a defendant's resources and eliminate funds available to compensate future claimants. Under class proceedings, however, a court may establish a trust fund to ensure that resources are available to compensate future victims at a time when they can prove their damages.[254] Further, the notice to all class members required by Rule 23(c)(2) alerts potential class members of their opportunity to file suit.[255]

A judge presiding over a class action will be in a better position to correct and punish any ethical impropriety that occurs within a class proceeding.[256] Moreover, she will have the means to bind each party under the authority of Rule 23. The multiplicity of judges involved in individual suits are less able to counter these risks because they lack the means to supervise and control any of them. Thus, class actions do not present unavoidable risks of collusion, claim solicitation, and harm to the interests of future claimants.

### G. *The Opt Out and Final Resolution of Claims*

Although defendants usually challenge plaintiffs' petitions for class certification,[257] defendants may derive significant benefits from class action treatment of mass product liability claims. Class certification provides the advantage of offering defendants the opportunity to vindicate themselves in one suit, as opposed to defending hundreds of

absent class members." (quoting Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975))).

253. A judge presiding over a class action can protect the absentees' due process rights by ensuring that the named plaintiffs are sufficiently interested to monitor the attorneys and have interests sufficiently aligned with the absentees so as to assure that monitoring serves the interest of the class as a whole. *See General Motors*, 55 F.3d at 784.

254. Trust funds have also been created during bankruptcy proceedings involving defendant manufacturers. *See, e.g.*, *World News Saturday: Strategic Bankruptcy* (ABC television broadcast, June 3, 1995) ("Patricia Houser, Manville Trust: And we now have over $3 billion available to pay the expected half-a-million claims well into the next century."); *Keep it Alive, Make it Pay*, The Plain Dealer, May 20, 1995, at 10B ("Dow Corning Corp.'s decision to file for bankruptcy protection this week doesn't mean that all is lost for the thousands of plaintiffs who have sued company . . . if Dow Corning comes out of the reorganization with a healthy trust fund, like the $2.5 billion one created by onetime asbestos giant Manville Corp., bankruptcy might eventually be a win-win situation for both parties.").

255. *See* Fed. R. Civ. P. 23(c)(2).

256. *Individual Justice*, *supra* note 26, at 584 (stating that "judicial scrutiny of proposed settlement distributions are effective safeguards").

257. *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294 (7th Cir.) (decertifying class of HIV-infected hemophiliacs on defendants' motion), *cert. denied*, 116 S. Ct. 184 (1995); *In re* Copley Pharmaceutical, Inc., 161 F.R.D. 456, 457 (D. Wyo. 1995) (denying defendants' motion to decertify a class of plaintiffs who used a defective bronchodilator).

individual suits.[258] Granted, because class actions certified under Rule 23(b)(3) allow plaintiffs to opt out, one trial may not provide a complete resolution of the litigation. Under class action management, however, many claims against defendants are subject to a single resolution, allowing defendants the capacity to cap their exposure to liability, reduce uncertainty, and limit transaction costs.[259]

Moreover, if a high number of class members choose to opt out, and the class action device no longer appears to provide an appropriate solution, a judge may revoke class certification.[260] A judge overseeing a class may determine that if too many class members opt out, the class action vehicle may no longer provide the superior method to litigate the claims. This problem will not occur often, however, because few claimants typically opt out of a reasonably run class action.[261]

Class actions under Rule 23(b)(3) cannot provide a complete resolution of every claim against a particular defendant. Nevertheless, class certification may resolve a great number of the claims and significantly benefit both plaintiffs and defendants.

## IV. THE CASE FOR APPLYING RULE 23(b)(3) CLASS ACTIONS IN MASS PRODUCT LIABILITY LITIGATION

Commentators have advanced various proposals that would increase the civil justice system's ability to process mass product liability claims more efficiently.[262] These proposals range from adopting

258. Weinstein, *supra* note 30, at 135.

259. Hensler & Peterson, *supra* note 1, at 1050 ("[G]lobal settlements are attractive even when the price is high, because they offer the opportunity to reduce uncertainty and limit transactions costs.").

260. *See* Fed. R. Civ. P. 23(b)(3), (d). This type of class action is revocable under the discretion of the judge.

261. *See* Weinstein, *supra* note 30, at 136.

262. *See infra* notes 264-66.

new procedural rules,[263] to revising the application of existing rules,[264] to creating new fora to process mass torts.[265] Currently, none of these proposals appears to enjoy strong support. As a result, judges are left to adopt other means of resolving mass product liability litigation. These dispositions are typically negotiated settlements. Such settle-

263. *See* Hensler & Peterson, *supra* note 1, at 1055-56. Several proposals have sought to permit "multidistricting" tort claims across federal and state jurisdictions—not only for pretrial management, but for trial as well. *Id.* at 1055. In 1989, the American Bar Association Commission of Mass Torts drafted a recommendation for Congressional approval of federal court jurisdiction for litigation that involved over 250 claims arising out of a single accident or exposure to one product. *Id.* In 1991, the House considered establishing federal jurisdiction over mass disaster claims that involved more than 25 deaths or injuries resulting from a single accident at a discrete location. Cases were to be transferred to a single jurisdiction for a determination of liability and punitive damages. Cases would be remanded to their original court to determine other damages. *Id.* The American Law Institute has recommended that Congress adopt a uniform federal choice of law code for complex litigation. *Id.* at 1056. These proposals have only engendered slight support, however.

Other legal commentators have advocated creation of a federal common law. Schultz, *supra* note 16, at 604; *see also* Mullenix, *supra* note 166, at 760 (discussing a "series of qualified arguments supporting federalization of mass tort litigation"); Aaron D. Twerski, *With Liberty and Justice For All: An Essay on Agent Orange and Choice of Law*, 52 Brook. L. Rev. 341, 366 (1986) (discussing Judge Weinstein's creation of a national consensus law in the Agent Orange litigation); Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 Fordham L. Rev. 167, 201 (1985) (stating that "the federal courts must be allowed to consider whether to develop and apply federal common law").

264. *See* Hensler & Peterson, *supra* note 1, at 1052-55. For instance, judges could invoke Federal Rule 42(a) with greater frequency to consolidate cases. In Cimino v. Raymark Indus., 751 F. Supp. 649 (E.D. Tex. 1990), Judge Robert Parker of the Eastern District of Texas consolidated approximately 2000 asbestos claims. *Id.* at 653. Judge Parker selected 160 cases to represent the aggregated claims and tried these cases in multiple phases. *Id.* One jury determined the defendants were liable during Phase I, and then determined a schedule that would calculate punitive damages. *Id.* In Phase II, a second jury heard evidence regarding the plaintiffs' exposure to the defendants' products, and then heard evidence regarding contributory negligence. *Id.* In Phase III, a jury determined damages for individuals and corresponding "disease categories." *Id.* The plaintiffs whose cases were tried recovered the amount provided by the jury. *Id.* The nonrepresentative cases were awarded the average amount that corresponded with their type of injury. *Id.* This type of aggregation has not engendered much support from practitioners or judges. *See also* Hensler & Peterson, *supra* note 1, at 1054 ("Leading mass tort practitioners and judges with prior experience in dealing with such cases evince little enthusiasm for replicating the experience.").

265. *See* Hensler & Peterson, *supra* note 1, at 1059. Some commentators have suggested establishing a master disaster court that would exclusively resolve mass personal injury claims. *See, e.g.*, Ralph I. Lancaster & Catherine R. Connors, *Creation of a National Disaster Court: A Response to "Judicial Federalism in Action"*, 78 Va. L. Rev. 1753, 1754 (1992) (advocating that one disaster court be established to resolve mass personal injury claims). A radical proposal for resolving mass tort claims is to substitute statutory administrative compensation schemes for tort law. *See, e.g.*, Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 Cardozo L. Rev. 1891 (1992) (proposing the creation of an industry-financed trust fund to pay for the damages). Lastly, claims resolutions facilities may offer administrative compensation schedules and alternative dispute resolution. *See, e.g.*, Francis E. McGovern, *Foreword*, Law & Contemp. Probs., Autumn 1990, at 1, 2 (discussing the advisability of creating claims resolution facilities).

ments do not offer plaintiffs the opportunity to voice their claims publicly, nor do they offer defendants the opportunity to vindicate themselves expressly.[266] Moreover, defendants may face pressure to settle cases that have little legal merit, and plaintiffs often accept compensation that poorly reflects their current and future losses.[267]

Rules 23(b)(3) and 23(c)(4)(A) offer judges a vehicle by which to process and resolve mass product liability litigation, in appropriate cases, in a superior manner than is available through other means of adjudication. The Supreme Court has stated that class actions serve important objectives, including "the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits and the facilitation of the spreading of litigation costs among numerous litigants with similar claims."[268] Free use of Rule 23(b)(3) class actions to resolve common issues in mass product liability litigation would provide a more fairly balanced forum for the resolution of defendants' and plaintiffs' claims.[269] Plaintiffs would benefit from the economies of scale granted by Rule 23(b)(3). Defendants would have the opportunity to bind all class members that have not chosen to opt out and to vindicate themselves with respect to certain issues in one suit. In addition, if a court partially certifies a class to resolve select issues, class certification can maximize the advantages of aggregating claims, while protecting parties with stronger individual claims or defenses against their adversaries.[270]

Employing Rule 23(b)(3) class actions in the mass product liability context provides numerous advantages to all parties involved in the resolution of mass product liability litigation, including the overburdened judicial system. The many advantages of certifying class actions to resolve mass product liability claims will be discussed below.

### A. *Avoiding Expensive, Repetitive Litigation*

A high degree of commonality of factual issues and legal questions is present in most mass product liability claims.[271] Similar injuries

266. *See* Hensler & Peterson, *supra* note 1, at 1032.

267. *See id.* (stating that "mass personal litigation inevitably becomes more of a financial transaction than a dispute over defendants' culpability and plaintiffs' monetary and nonmonetary losses").

268. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980).

269. *See* Fed. R. Civ. P. 23(c)(4).

270. *See In re* A.H. Robins Co., 880 F.2d 709, 742-43 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *In re* School Asbestos Litig., 789 F.2d 996, 1009 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1987); Jenkins v. Raymark Indus. Inc., 782 F.2d 468, 472-73 (5th Cir. 1986); *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

271. *See* Hensler & Peterson, *supra* note 1, at 966-67.

will involve similar causation issues,[272] and similar liability issues will be present if plaintiffs' injuries resulted from exposure to a particular product manufactured by a defendant.[273] Because the facts and liability issues are common to most plaintiffs, the legal strategy employed by all claimants will most likely be similar.[274] Moreover, under Rule 23(c)(4)(A), a court can determine what common issues exist and only partially certify a class only to resolve those questions.

Accordingly, certification of class actions would avoid repetitive, time consuming, and expensive litigation.[275] Allowing individual cases to proceed independently where each case repeats the same evidence and legal theories is indefensible.[276] By preventing parties from litigating the same claims thousands of times, class actions allow plaintiffs and defendants to reduce notoriously high costs in mass product liability litigation.[277] If mass product liability litigation proceeds on an individual case basis, the burden of duplicative litigation is enormous.[278] Courts that cling to the concept that each case must involve individual discovery, trial, and appeal processes often delay or deny victims compensation and thereby compromise the interests of justice.[279]

Class action certification enables a court with an overburdened docket to process cases more quickly.[280] Class action certification decreases the number of repetitive suits that consume public resources and deprive other claimants of access to justice by crowding the courts' dockets.[281] Moreover, an overburdened judicial system may

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272. *Id.*

273. *Id.*

274. *Id.*

275. *See* General Tel. Co. v. Falcon, 457 U.S. 147, 159 (1982); *In re* General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 783 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) ("Class certification enables courts to treat common claims together, obviating the need for repeated adjudications of the same issues."); Newberg & Conte, *supra* note 43, § 1.06, at 1-17 to 1-19.

276. *See* Newberg & Conte, *supra* note 43, § 17.01, at 17-3 to 17-4 ("The interests of justice are not furthered by the needless, time-consuming repetition of evidence and repeated litigation of issues in individual trials on a one-by-one basis which are common to the claims of all affected.").

277. *See Individual Justice*, *supra* note 26, at 563.

278. *Id.* These costs particularly affect plaintiffs. *See infra* notes 292-96 and accompanying text.

279. *See* Newberg & Conte, *supra* note 43, § 17.01, at 17-3 to 17-4.

280. Schultz, *supra* note 16, at 556 n.14; *see also* Feinberg, *supra* note 189, at 82 ("Litigation of mass tort controversies involving hundreds or thousands of claims in a single forum or proceeding severely stresses traditional legal procedures and conventions.").

281. *See In re* School Asbestos Litig., 789 F.2d 996, 1008 (3d Cir.) ("Determination of the liability issues in one suit may represent a substantial savings in time and resources."), *cert. denied*, 479 U.S. 852 (1986); *Individual Justice*, *supra* note 26, at 564 ("The redundant adjudication of mass tort claims thus consumes vast quantities of public resources, raising the price of access for other, sporadic, types of tort claims.").

have to adopt procedures that discourage people from resorting to the judicial system, even if they need it.[282]

By reducing the cost of litigation, class certification opens access to the civil justice system to those injured parties who might otherwise be unable to sue.[283] In *In re Copley Pharmaceutical, Inc.*,[284] the court stated that the most convincing reason for certifying the class was offered by plaintiffs' counsel who stated that "without class certification his clients would essentially lose their claims because neither he nor his clients had the resources to sue a large defendant like Copley."[285] Mass product liability cases typically involve complex factual and legal questions that "are exceedingly, if not prohibitively, expensive" for individuals to litigate independently.[286] Mass product liability personal injury cases also present difficulties in proving causation and crafting remedies, further elevating the cost of litigating such a case.[287] Thus, high costs greatly reduce the incentive for plaintiffs to bring individual suits and decrease the recovery for the victims litigating the claim.[288] In addition, if cases are brought individually, defendants may be subject to a "punishing surcharge," from multiple punitive damage awards and the costs associated with repeated litigation of identical issues.[289]

Class certification also offers benefits that may not be attainable by means of alternative methods of adjudication. The two methods of adjudication that come closest to attaining benefits provided by class actions are consolidation of cases and multidistrict litigation.[290] Both of these procedures, however, fall short of providing certain advantages unique to class actions. Multidistrict litigation fails to provide the most efficient method to resolve mass product liability claims. While multidistrict litigation may reduce the burdens of multiple pretrial proceedings, it does not extend similar efficiency to the expensive

282. *See* Feinberg, *supra* note 189, at 82 (stating that "[t]he sheer number of parties alone can make even the most routine pretrial discovery proceeding or motion hearing exceedingly burdensome, and often ties up judicial resources to the detriment of litigants in other cases").

283. *See Individual Justice*, *supra* note 26, at 570 (stating that "cost barriers are compounded by other prevalent conditions, such as the low income status of a significant number of the victims, and the relatively low probability of success at trial that characterizes these legally and factually complex cases").

284. 161 F.R.D 456 (D. Wyo. 1995).

285. *Id.* at 466.

286. *Individual Justice*, *supra* note 26, at 563.

287. *Id.*

288. For example, in asbestos litigation, the plaintiffs received only 39% of their award after deducting litigation expenses. James S. Kakalik et al., Variation in Asbestos Litigation, Compensation and Expenses 89 (1984).

289. *Individual Justice*, *supra* note 26, at 564; *see also* Marcus, *supra* note 210, at 861 (discussing that there is no "right" to punitive damages, and thus, a defendant should not be subject to multiple punitive damages for a unified course of conduct).

290. *See* 28 U.S.C. § 1407 (1994) (providing for multidistrict litigation); Fed. R. Civ. P. 42(a) (providing for consolidation of cases).

and onerous trial process. In addition, consolidating cases may not achieve certain benefits attainable by class actions. The efficiency of consolidating cases affects only those cases that a jurisdiction attempts to resolve in one trial. Unless all cases are subject to consolidated trial in one jurisdiction, which is not likely to occur, the mechanism will not achieve the same conservation of judicial resources as a Rule 23(b)(3) class action. Moreover, neither method of adjudication provides a court with the power to oversee and limit attorney's fees or to confine common resolution to common issues.

As a result, the invocation of Rule 23(b)(3) class actions in the mass product liability context achieves maximum benefits for both parties by providing a single forum in which to litigate a mass product liability claim, significantly reducing transaction costs, and opening access to the civil justice system.[291] Moreover, the judicial efficiency achieved by aggregating claims provides benefits that extend beyond the parties involved in the litigation to other participants in the civil justice system who might otherwise be deprived of access to a system that is often overburdened by resolving numerous mass product liability claims.

### B. *Leveling the Playing Field Between Plaintiffs and Defendants*

The current civil justice system, focused on individual justice, does not allow plaintiffs to aggregate their claims fully. Defendants, however, may spread their litigation costs over the entire class of mass product liability claims.[292] Most liability issues and their corresponding defenses will be substantially the same for all claims in a mass exposure suit, thereby allowing defendants to develop fully one defense to all claims.[293] For instance, in the asbestos litigation, the defendants "organized into a consortium to pursue common defense and settlement strategies, united behind a single counsel."[294] As a result, defendants involved in mass product liability litigation are "repeat players."[295] The advantage of being a "repeat player" is that these parties only need to develop one defense; thus, they are in a financial position to invest more in developing that single legal strategy. These savings place the defendants in a position to finance a "war of attrition" through costly discovery and motion practice that depletes their adversary's financial resources.[296] By contrast, plaintiffs are only one time players, who must finance their case from beginning to end, in-

291. *See* Newberg & Conte, *supra* note 43, § 17.03, at 17-10 to 17-11.
292. *Individual Justice*, *supra* note 26, at 564.
293. *See* Coffee, *supra* note 2, at 1365. John Coffee noted that in cases involving asbestos, the Dalkon Shield, and Bendectin, the litigation often may focus on one defendant and negotiations would be with a single defense counsel. *Id.*
294. *Id.*
295. *Id.*
296. *See Individual Justice*, *supra* note 26, at 571.

cluding having to stave off defendants' attempt to finance a "war of attrition." In *In re Copley*, the court recognized that to permit the defendant to contest liability against each claimant in an independent suit would give defendants an advantage equivalent to excluding certain claimants from the civil justice system.[297]

Defendants also may benefit from class action treatment. Under Rule 23(b)(3) class actions, if defendants win the class action all plaintiffs are bound unless they exercise their right to opt out.[298] Accordingly, class certification allows defendants to translate one win to a widespread victory. Consequently, Rule 23(b)(3) provides a necessary means to level the playing field between defendants and plaintiffs in mass product liability litigation.

### C. *Ensuring that Plaintiffs Achieve Full and Fair Compensation*

The civil justice system does not adequately compensate victims when courts disfavor class certification in the mass product liability context. High transaction costs plague the system, often with the result that attorneys for both parties benefit most from case-by-case adjudication of mass product liability claims.[299] Defense lawyers may exploit their hourly fee arrangements by preparing for numerous individual trials. Plaintiffs' attorneys are more in demand if claims are taken to court on a case-by-case basis as opposed to one class action.[300]

Rule 23(e), however, provides courts with the opportunity to limit the number of attorneys involved in a class action suit and the power to control attorneys' fees as part of a class proceeding.[301] In addition, a judge presiding over a class action may ensure that attorneys' fees are commensurate with the savings engendered by consolidation of expenses, including discovery and expert witnesses.[302]

Moreover, in the absence of class certification, plaintiffs frequently endure longer delays in receiving their just compensation.[303] In fact,

297. *In re* Copley Pharmaceutical, 161 F.R.D. 456, 466 (D. Wyo. 1995); *see also* Weeks v. Bareco Oil, 125 F.2d 83, 90 (7th Cir. 1941) (requiring plaintiffs to bring individual suits would exclude many small claimants from attaining justice).

298. Notably, few class members typically opt out of a reasonably run class action. *See* Weinstein, *supra* note 30, at 136.

299. *See* Hensler & Peterson, *supra* note 1, at 1031.

300. *See Individual Justice*, *supra* note 26, at 571 ("Class treatment of mass tort claims from a particular accident require only a fraction of the legal services provided by plaintiff attorneys compared to case-by-case adjudication, which disperses claims widely over territory and time.").

301. *See* Fed. R. Civ. P. 23(e); Jones v. Amalgamated Warbasse Houses, 721 F.2d 881, 884 (2d Cir. 1983), *cert. denied*, 466 U.S. 944 (1984); *Individual Justice*, *supra* note 26, at 571-72.

302. Weinstein, *supra* note 30, at 136.

303. *See* Schultz, *supra* note 16, at 562.

many victims will die before receiving any compensation at all.[304] For example, in *Rhone-Poulenc*, in the absence of class certification, years may pass before the plaintiffs recover—years these individuals who are infected with HIV and are often in late stages of AIDS—do not have.

Class certification ensures that plaintiffs, rather than their attorneys, will receive most of the compensation awarded in a case.[305] Moreover, class actions provide a vehicle that allows courts to process mass exposure claims more quickly. Therefore, classes should be certified in mass product liability litigation to ensure that plaintiffs with meritorious claims may, at the very least, live to see their compensation.

### D. *Providing an Incentive For Companies To Make Their Product Safer*

Class action certification in mass product liability litigation is also necessary for the tort system to serve its deterrent function.[306] The threat of mass liability provides an incentive for firms to take due care to investigate how to make their product safe and avoid injury to the consumers of their product.[307] Although the potential for mass liability may frighten insurers and manufacturers from research and development in some product lines and markets,[308] mass liability also provides a necessary deterrent to irresponsible, dangerous behavior on the part of companies. Without providing the class action as a vehicle to bring these claims, many plaintiffs simply would not sue.[309] A reduction in claims decreases the defendant company's incentive to take safety precautions.[310] Sporadic claims against a corporation do not provide a sufficient deterrent.[311] Paying claims in several individual lawsuits is a small price in comparison to the profits often realized as a result of the company's imprudent behavior.[312]

The civil justice system must provide adequate deterrence to keep companies from developing and marketing unsafe products.[313] In the

304. *Id.* at 562. Four hundred asbestos plaintiffs involved in the case of Cimino v. Raymark Industries, 751 F. Supp. 649 (E.D. Tex. 1990), died while waiting for their cases to be heard. Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 Stan. L. Rev. 815, 819 (1992). The *Cimino* case did not involve a class action because the Fifth Circuit decertified the class originally certified by the District Court. *Id.* at 819-20.

305. *See supra* notes 301-02 and accompanying text.

306. *See Individual Justice*, *supra* note 26, at 565.

307. *Id.* at 573 ("Accordingly, the threat of liability should induce firms engaged in risky activities to take due or optimal care by investing in safety precautions.").

308. *See* Hensler & Peterson, *supra* note 1, at 961.

309. *See supra* notes 284-86 and accompanying text.

310. *See Individual Justice*, *supra* note 26, at 573.

311. *See id.*

312. *See infra* notes 316-23 and accompanying text.

313. Trends in Tort Litigation, *supra* note 1, at 32 ("To many scholars, attorneys, and litigants, deterrence is a central concern: The system has a clearly stated interest

absence of the deterrence provided by the civil justice system, these companies are left to purely market driven incentives to make their product safer.[314] The harms that may occur when companies are left to self-regulation are evident in the *Rhone-Poulenc* case and in *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation.*[315]

In the *Rhone-Poulenc* case, the manufacturers of AHF failed to inactivate viruses in their blood product, not because they did not posses the technology, but because they felt it was not cost effective.[316] The Food and Drug Administration ("FDA") did not provide effective or sufficient deterrence, because once the pharmaceutical companies proved a minimum level of "safety," the FDA did not inquire whether the companies at any time could have made the product still safer.[317] The FDA was actually satisfied with the safety of AHF because it only contained some "tolerable" viruses, including the deadly Hepatitis B virus—not knowing that one of those viruses, HIV, would later have devastating effects on the hemophiliac population.[318]

A similar situation ensued in *Northern District of California, Dalkon Shield IUD Products Liability Litigation.*[319] Hugh Davis, inventor of the Dalkon Shield, studied the safety and effectiveness of his product.[320] Davis, however, had falsified the results of his studies.[321] At the time Davis' product was approved for marketing, the FDA did not have the authority to regulate "medical devices."[322] As a result,

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in trying to deter manufacturers from making bad products; to deter doctors from practicing bad medicine; to deter businesses from trying inappropriate practices.").

314. *See* Shaw, *supra* note 74, at E2 (recounting that manufacturers of AHF did not research ways to make their product safer until they projected a loss of business should the competing companies develop a safer product first).

315. 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

316. *See* Shaw, *supra* note 74, at E2 ("No medical, economic or social reason could justify ever using . . . unheated, pooled plasma or its clotting products . . . . Large pools are highly profitable, but they are medically bankrupt." (citation omitted)).

317. *Id.* (stating that "officials at the FDA 'tended to drag their feet'—and were too chummy with industry" (quoting Thomas C. Drees, first president of Alpha Therapeutics Corp., a manufacturer of AHF)).

318. *Id.* ("It wasn't long, though, before hepatitis from blood products had become a leading killer of hemophiliacs. But the government, manufacturers of the blood-clotting concentrates, and some doctors called this an acceptable risk, given the medicine's hugh benefits, and federal regulators allowed the medicines to be sold, with labels warning about hepatitis.").

319. 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

320. *See* Morton Mintz, At Any Cost: Corporate Greed, Women and The Dalkon Shield 115 (1985); Hensler & Peterson, *supra* note 1, at 1018.

321. Mintz, *supra* note 320, at 115; Hensler & Peterson, *supra* note 1, at 1018.

322. Prior to 1976, Congress lacked the power to regulate medical devices. Robert W. Stewart, *Report Attacks Sale of Faulty Heart Devices*, L.A. Times, Feb. 26, 1990, at A3. Congress adopted the Medical Device Amendments in 1976, however, which closed this loophole. *See* Hensler & Peterson, *supra* note 1, at 1017-18 nn.290-91.

Robins was allowed to put an untested product on the market that eventually proved extremely dangerous.[323]

Arguably, the goal of deterrence should receive more attention than the goal of compensating victims.[324] Money judgments can never provide a perfect remedy to individuals harmed by the manufacturers of defective products.[325] The use of the class action and the tort system, however, may be more effective to prevent future, noncompensable, wrongful infliction of harm on individuals.[326]

Some commentators, however, disagree that deterrence is ever attainable in the mass product liability context.[327] Proponents of this view argue that because there is a long latency period between a plaintiff's exposure to a harmful product and the time the negative effects of the product become apparent, deterrence is not possible because the product is typically no longer on the market.[328] This argument ignores the fact, however, that the deterrent effect does not necessarily have to discourage the defendants from acting in a safe manner with respect to the actual product or accident that gave rise to that particular action. The deterrent effect created by the possibility of mass liability should carry over to the company's behavior in all areas.

In light of the numerous advantages provided by Rule 23(b)(3) class actions as well as the methods by which courts may overcome traditional objections to class certification, courts should exercise their discretion to certify Rule 23(b)(3) class actions to resolve mass product liability claims. Often certain issues, including the liability of the defendants, are common to the entire class and warrant partial certification under Rules 23(b)(3) and 23(c)(4)(A). The next section argues that the advantages of Rules 23(b)(3) and 23(c)(4)(A) could have been beneficial in resolving common issues in *Rhone-Poulenc.* This next section argues that the potential class met Rule 23(a)'s prerequisites in addition to falling within the parameters of a Rule 23(b)(3)

323. *See* Hensler & Peterson, *supra* note 1, at 1018.

324. *See Individual Justice*, *supra* note 26, at 580.

325. *Id.* at 580 ("Because money judgments can never in principle or reality provide a perfect substitute for the right not to be wrongfully harmed in the first place, a postulate of rights-based deterrence should supplement the traditional premises of corrective justice.").

326. *Id.* at 580-81 ("Pursuant to this . . . theory . . . the function of the tort system is to protect rights to personal security not only by compensation after-the-fact, but also by policing the behavior of would-be rights violators to prevent wrongful infliction of incompensable losses—harms which cannot be compensated ex post.").

327. *See, e.g.*, Rabin, *supra* note 25, at 962 ("A system designed to achieve corrective justice goals in two-party accidental harm cases simply cannot be accommodated effectively to the demands of mass tort cases [involving] . . . long-latent toxic disorders."); Robinson, *supra* note 25, at 785 ("[T]he deterrent value of legal penalties for managerial error depends heavily on the proximity of the penalties to the actions for which they are assessed.").

328. *See* Coffee, *supra* note 2, at 1355-56.

class action, and thus the Seventh Circuit should have permitted the use of class certification in *Rhone-Poulenc*.

### F. *Denial to Apply Rule 23(b)(3) in* Rhone-Poulenc *Was Misguided*

The potential class in *Rhone-Poulenc* should have been certified. Judge Posner's reversal of the District Court's certification order was misguided because the potential class met all of the requirements of a Rule 23(b)(3) class action. This section demonstrates that the class in *Rhone-Poulenc* met the four prerequisites of Rule 23(a). Furthermore, this section demonstrates that class certification was proper under Rule 23(b)(3) because it provided a superior method to resolve the controversy and common issues predominated in the litigation.

In order for a class to meet Rule 23(a)'s first requirement of numerosity, the potential class must be so numerous that joinder of all members is impracticable.[329] "Rule 23(a)(1) requires, [however], only that joinder of all members be difficult and impracticable, not impossible."[330] An estimated 20,000 persons in the United States have hemophilia, and almost half of them may be infected with HIV.[331] Some potential class members may be unaware of their HIV status.[332] As a result, many potential plaintiffs are not even known. Thus, the potential class met the numerosity requirement because joinder of unknown plaintiffs is impracticable.[333]

The second requirement of Rule 23(a), commonality, was also met by the potential class.[334] "The threshold of 'commonality' is not high. . . . [T]he rule requires only that resolution of the common questions affect all or a substantial number of the class members."[335] All defendants, except the National Hemophilia Foundation, conceded that the case presented common questions of law and fact.[336] The National Hemophilia Foundation argued that the determination of its lia-

329. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 415 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1296 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

330. Castano v. American Tobacco Co., 160 F.R.D. 544, 550 (E.D. La. 1995); *See* 7A Charles A. Wright et al., Federal Practice & Procedure § 1762 (1986).

331. *Wadleigh*, 157 F.R.D. at 415.

332. *Id.* at 416.

333. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 416, *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995); *see also* Jack v. American Linen Supply Co., 498 F.2d 122, 124 (5th Cir. 1974) ("[J]oinder of unknown individuals is certainly impracticable. Thus the requirements of Rule 23(a)(1) would appear to be met here."). Moreover, even if the case eventually involves only several hundred plaintiffs, joinder may still be impractical. The Fifth Circuit recognized that "[t]he basic question is practicability of joinder, not number of interested persons per se." *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

334. *See* Fed. R. Civ. P. 23(a)(2).

335. Jenkins v. Raymark Industries, 782 F.2d 468, 472 (5th Cir. 1986) (citations omitted).

336. *See Wadleigh*, 157 F.R.D. at 416.

bility will involve different facts than those involved in the determination of the pharmaceutical companies' negligence.[337] The essence of the case, however, rests upon one principal factual question that applies to all defendants: What was the state of scientific knowledge at various times concerning the presence and transmission of HIV in AHF?[338] Accordingly, the case satisfied the commonality requirement.

The third requirement of Rule 23(a) is typicality.[339] The typicality requirement ensures that the class representatives will have claims typical of absent class members.[340] The claims of the representatives and absent members need not be identical.[341] According to Seventh Circuit:

> "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members. Thus, similarity of legal theory may control even in the face of differences of fact.[342]

The complaint in *Rhone-Poulenc* alleges that all class members suffered injury as a result of the defendants' failure to screen high-risk donors and deactivate viruses in AHF. Moreover, all class members allege that the Foundation negligently failed to warn class members of the dangers of treatment with AHF. Thus, the plaintiffs have met the typicality requirement.[343]

The final requirement of Rule 23(a) is that the class representatives must fairly and adequately protect the interests of the class.[344] "The adequacy requirement mandates an inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and control the

337. *Id.*

338. *Id.* The commonality requirement does not require all issues to be common to all parties. *See, e.g.*, Watson v. Shell Oil Co., 979 F.2d 1014, 1022 (5th Cir. 1992) ("The commonality requirement focuses on the common issues relevant to claims by or against the class members; it does not require that all issues be common to all parties."); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988) ("[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.").

339. *See* Fed. R. Civ. P. 23(a)(3).

340. *Wadleigh*, 157 F.R.D. 410, 417 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

341. *Id.*

342. De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983) (citations omitted).

343. *Wadleigh*, 157 F.R.D. at 417.

344. *See* Fed. R. Civ. P. 23(a)(4).

litigation and protect the interests of absentees."[345] Although factual differences do exist among plaintiffs' claims, such as the severity of their hemophilia and whether they used every brand of AHF, the complaint confirms the participation of "at least one class representative for each base that needs to be covered."[346] As a result, the proponents of certification satisfied the adequacy requirement.

The potential class in *Rhone-Poulenc* also falls within the parameters of a class action maintainable under Rule 23(b)(3). The questions of law or fact common to members of the class predominate over any questions affecting only individual members, and a class action is superior to other methods for the fair and efficient adjudication of the controversy.

Common issues must constitute a significant part of the individual cases to predominate.[347] The defendant manufacturers have engaged in similar conduct in their manufacture of AHF. "A major common issue is whether that conduct was negligent."[348] Moreover, all plaintiffs claim to have suffered injury in the same manner—they all have contracted HIV through the use of the defendants' products.[349] As a result, the question regarding whether the defendants' conduct was negligent is common to all members of the class.

The defendants allege, however, that questions such as proximate cause raise individual issues.[350] The defendants are correct that the proximate cause question is not appropriate for class-wide adjudication because individual issues do predominate with respect to this issue.[351] Under the power of Rule 23(c)(4)(A), however, the court does not need to certify a class to resolve the entire controversy. The court can certify a Rule 23(b)(3) class action to resolve only particular is-

345. Horton v. Goose Creek Independent School District, 690 F.2d 470, 484 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) (citations omitted).

346. *Wadleigh*, 157 F.R.D. 410, 417 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

347. *See* Watson v. Shell Oil Co., 979 F.2d 1014, 1022 (5th Cir. 1992) ("In the context of mass tort litigation, we have held that a class issue predominates if it constitutes a significant part of the individual cases."); Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5th Cir. 1986) (noting that "[i]n order to 'predominate,' common issues must constitute a significant part of the individual cases"); *In re* School Asbestos Litig., 104 F.R.D. 422, 431-32 (E.D. Pa. 1984) (noting that when "common questions . . . [are] a significant aspect of the case" certification is allowed), *aff'd in part, rev'd in part*, 789 F.2d 996 (1986), *cert. denied*, 479 U.S. 852 (1986); *see also In re* Tetracycline Cases, 107 F.R.D. 719, 727 (W.D. Mo. 1985) (stating that "the issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole").

348. *Wadleigh*, 157 F.R.D. at 418.

349. *Id.*

350. *See id.* at 421.

351. *Id.* at 422. Each class member may confront formidable problems including having to prove which company's negligence was the proximate cause of his injury. The laws of the states are in complete disarray regarding the burden of proof facing a plaintiff hoping to prove proximate cause. As a result, certification regarding this issue is inappropriate. *See id.*

sues, including the defendants' negligence. This concession does not diminish the reality that without first proving the defendants' breach or negligence, a question common to all class members, class members will not even have the opportunity to present their individual cases with respect to causation and damages.[352]

The final question considered by a court when determining whether a case is appropriate for class action treatment is whether the class action vehicle is superior to all other available options for efficient and fair adjudication of the controversy.[353] Certification of the class in *Rhone-Poulenc* under Rule 23(b)(3) to resolve issues that predominate in the litigation was superior to other methods available. A class action would provide the most efficient means to adjudicate the issue of liability. If plaintiffs have to bring suits individually, both parties will be forced to litigate "over and over again the same questions of what was known, when it was known, what should have been done, when it should have been done, and whether it would have worked in any event."[354] Judge Grady considered the interests of judicial efficiency and decreasing the economic burden on parties litigating the case as a strong indication of the superiority of the class action device.

Moreover, other aggregative techniques do not provide equivalent means to attain efficiency available under Rule 23(b)(3). Multidistrict litigation falls short of providing the most efficient method to resolve mass product liability claims. While multidistrict litigation engenders a certain level of efficiency at the pretrial stage, eventually cases are remanded to their original jurisdiction for trial. The actual trial process is extraordinarily expensive. As a result, multidistrict litigation does not provide maximum efficiency in processing claims. Moreover, consolidation of cases does not achieve efficiency comparable to that

352. The defendants objected to the possibility of requiring one jury to apply 50 negligence standards in effect in different states. The defendants only advanced two differences in state law, however. The first difference is that only some states distinguish between ordinary negligence and a professional standard of care. *Id.* at 418. A jury can easily distinguish between these two standards, however, and apply the law of each. The second difference is that some states incorporate the foreseeability of injury into their negligence standards and others do not. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1301 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). A jury may similarly distinguish between these two standards.

353. *See* Fed. R. Civ. P. 23(b)(3).

354. Wadleigh v. Rhone-Poulenc, Rorer, Inc., 157 F.R.D. 410, 425-26 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). The parties will have to relitigate claims already decided in 12 cases. *See, e.g.*, Christopher v. Cutter Labs., 53 F.3d 1184, 1186 (11th Cir. 1995) (reviewing an appeal from a jury award of $2 million to an HIV-infected hemophiliac against Armour Pharmaceutical Company); Jones v. Miles Labs., 887 F.2d 1576, 1577-78 (11th Cir. 1989) (upholding district court's judgment notwithstanding verdict for defendant manufacturer of AHF, after jury awarded HIV-infected plaintiff $1.6 million); McKee v. Cutter Labs., 866 F.2d 219, 224 (6th Cir. 1989) (upholding district court's grant of summary judgment to manufacturers of AHF).

of Rule 23(b)(3). The benefits of consolidation are limited to the number of cases that are actually consolidated. Unless all cases are transferred into one jurisdiction, and all cases are consolidated for trial, judicial resources conserved would not reach the level that would be attained under a Rule 23(b)(3) class action. An additional alternative usually available to resolve mass product liability claims is the test case approach. A major disadvantage of this approach, however, is the strong potential for defendants to settle with the individual plaintiff in the test case.[355] Class members would not benefit if the plaintiff settles before a jury determines the defendants' liability which would allow other class members to utilize collateral estoppel with respect to the liability determination.[356]

In *Rhone-Poulenc*, Judge Grady and Judge Posner disagreed about an additional issue that factors into the superiority determination, whether the class would be manageable in light of possible differences between the state laws that could apply in the case. Judge Posner voiced legitimate concerns about the possibility that the class would become unmanageable if applicable state laws conflicted with respect to the liability of defendants.[357] Only two such conflicts were identified by the defendants, however, which could easily be resolved through certifying subclasses under Rule 23(c)(4)(B), to account for such differences.[358] Moreover, class certification orders are subject to revocation or modification as circumstances warrant.[359] If differences in state laws were identified that would complicate or prevent efficient and fair resolution of the issues certified, the judge may revoke or modify the certification. Thus, class certification at this stage of the litigation was superior in *Rhone-Poulenc* because it did not appear unmanageable.

Judge Posner cited other concerns in refusing to certify the potential class in *Rhone-Poulenc* which appear to question the superiority of the class action device to resolve the liability issue. He stated that a class action could unfairly subject the defendants to mass liability based upon one jury's findings and could exert extortionate settlement pressure upon the defendants.[360] Judge Posner's analysis, however, appears to dispense with the requirement that the superiority of the class action device should be measured against other available methods of adjudication. Arguably, alternative methods of resolution, including consolidated or individual trials, could subject the defendants to substantially equivalent settlement pressure and mass liability. If one jury

355. Newberg & Conte, *supra* note 43, § 4.27, at 4-111.

356. *Id.*

357. *Rhone-Poulenc*, 51 F.3d at 1300-02.

358. *Id.* at 1301-02.

359. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1308 (7th Cir.) (Rovner, J., dissenting), *cert. denied*, 116 S. Ct. 184 (1995).

360. *Id.* at 1298.

finds the defendants negligent during the course of an individual trial, other plaintiffs could translate that one victory into a complete victory for all plaintiffs through the use of nonmutual collateral estoppel. In the face of this similar mass liability, defendants may choose to avert this risk by settling the claims although the allegations against them may lack merit.

Class certification of common issues in *Rhone-Poulenc* was superior to other methods of adjudicating the issues for additional reasons. Under Rule 23(e), Judge Grady would have had the authority to limit and control attorneys fees—an opportunity that is not available by other methods of adjudication.[361] Furthermore, class adjudication would have provided for efficient resolution of common issues while protecting the interests of class members in advancing their own interests independently. Questions unique to class members would be adjudicated independently because the district court only agreed to resolve the common issue of the defendants' negligence as part of the class proceeding. Alternatively class members could have chosen to opt out of the class and pursued their claims independently. Finally, a Rule 23(b)(3) class action would have been superior because it would have levelled the playing field between plaintiffs and defendants. Plaintiffs would have received the economies of scale inherent in spreading the cost of litigation across the entire class. Defendants would have received the opportunity to bind all plaintiffs, except those who have chosen to opt out of the class, if they win the class action.

Accordingly, certification under Rules 23(b)(3) and 23(c)(4)(A) was the superior method of adjudicating the claim in *Rhone-Poulenc*. A certified class was the most efficient method of adjudication. Moreover, the class action was manageable, especially considering the power of the court under Rule 23(c)(4)(B) to certify subclasses if various state laws conflicted. Judge Posner's additional objections to class certification do not consider that other available methods to adjudicate the claim fall victim to identical complications. Finally, class resolution provides numerous advantages to parties litigating the claims that are not available in other methods of adjudication.

### F. *Advocating the Increased Use of Rule 23(b)(3) Class Actions*

Critics of class action certification in mass product liability claims have misplaced concerns of utilizing Rule 23(b)(3) in the context of mass product liability actions. As has been demonstrated, often when courts refuse to allow class resolution of mass product liability claims their objections rely on misperceptions or ignore the reality that courts are well equipped to deal with any of the cited complications. Moreover, the affirmative benefits that may be achieved by certifying

361. *See* Fed. R. Civ. P. 23(e).

class actions to resolve mass product liability claims outweigh any objection suggested by courts or commentators. Applying Rule 23(b)(3) in the mass product liability context provides a greater incentive for companies to engage in safe and responsible marketing and manufacture of their products. Moreover, the efficiency provided by Rule 23(b)(3), and its reduction of transaction costs, promotes access to the civil justice system and ensures that the maximum amount of any award available goes to the plaintiffs.

Thus, in Rule 23(b)(3), Congress provided judges with an effective means to manage complex cases in a way that promotes fairness and efficiency. Judges should take full advantage of this discretionary authority to certify classes for the resolution of common issues in mass product liability cases that meet Rule 23(b)(3)'s requirements.

## CONCLUSION

Modern companies profit from mass manufacturing and marketing products to the general public. Some of these products have the potential to harm or kill their consumers. Companies cannot reap all the profits of operating their businesses on a nationwide basis without accepting responsibility for the nationwide harm that can result from the use of a dangerous product. Thus, the tort system should provide an efficient avenue for victims to attain compensation for their injuries when companies abdicate their responsibility to exercise due care in the development and manufacture of their products.

Federal courts may certify class actions under Rule 23(b)(3) to resolve these claims efficiently and fairly. Courts have succumbed to unfounded fears, however, that certifying class actions in this type of litigation would be problematic. Consequently, courts have forced parties involved in mass product liability actions to litigate their claims independently or through less effective aggregative techniques. These objections to class certification may be overcome, however, by various means, including partially certifying classes with respect to common issues and certifying subclasses to account for conflicting applicable laws. If courts utilize Rule 23(b)(3) to resolve mass product liability claims or issues in this context, plaintiffs may enjoy the economies of scale provided by Rule 23(b)(3). Defendants may bind all class members, except those who have chosen to opt out, if they win a class action. Courts may eliminate repetitive litigation that crowds their dockets. Accordingly, courts should exercise their discretion to certify Rule 23(b)(3) class actions to resolve common issues in mass product liability claims.